(30,050)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 740

MID-NORTHERN OIL COMPANY, PLAINTIFF IN ERROR,

vs.

J. W. WALKER, AS TREASURER OF THE STATE OF MONTANA; JOSEPH M. DIXON, GOVERNOR OF THE STATE OF MONTANA; C. T. STEWART, SECRETARY OF STATE OF THE STATE OF MONTANA, ET AL., ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA

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[fol. 1] IN THE

SUPREME COURT OF THE STATE OF MONTANA

Caption omitted

[fol. 2] **Judgment Roll**

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF LEWIS AND CLARK

MID-NORTHERN OIL CO., a Corporation, Plaintiff,

vs.

J. W. WALKER, as Treasurer of the State of Montana; JOSEPH M. Dixon, Governor of the State of Montana; C. T. Stewart, Secretary of State of the State of Montana; J. W. Walker, Treasurer of the State of Montana; George P. Porter, Auditor of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, as the State Board of Equalization of the State of Montana, Defendants.

COMPLAINT—Filed July 2, 1921

[fol. 3] Plaintiff complains and alleges:

I. That the above named plaintiff is now and ever since the 19th day of April, 1920, has been a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business at the City of Billings, County of Yellowstone, State of Montana, and that as such corporation, has been, during all of said period of time, engaged in the business of prospecting, exploring and drilling for crude petroleum and natural gas and has been and is now engaged in the business of producing and marketing crude petroleum;

II. That the above named defendant, J. W. Walker, is the duly elected, qualified and acting Treasurer of the State of Montana; that Joseph M. Dixon is the duly elected, qualified and acting Governor of the State of Montana; that C. T. Stewart is the duly elected, qualified and acting Secretary of State of the State of Montana; that George P. Porter is the duly elected, qualified and acting Auditor of the State of Montana; and that Wellington D. Rankin is the duly elected, qualified and acting Attorney General of the State of Montana; and that the said Joseph M. Dixon, C. T. Stewart, J. W. Walker, George P. Porter and Wellington D. Rankin, in their respective official capacities, constitute and now are the State Board of Equalization of the State of Montana;

III. That upon the 28th day of January, 1921, the Government of the United States of America, issued to one Harrison Green, a

certain oil and gas lease under the terms and in accordance with the provisions of Section 20 of the Act of Congress approved February 25th, 1920 (Public #146) and commonly known as the "Leasing Law", which said lease so issued as aforesaid, covers and includes [fol. 4] the following described lands and premises, to-wit:

The Southwest Quarter of the Southeast Quarter (S. W. ¼ S. E. ¼) of Section Eleven (11), the Northwest Quarter of the Northeast Quarter (N. W. ¼ N. E. ¼) and the North Half of the Northwest Quarter (N. ½ N. W. ¼) of Section Fourteen (14), Township Fifteen (15) North, Range Twenty-nine (29) East of the Montana Principal Meridian, in Fergus County, Montana;

and which said lease was duly and regularly assigned by the said Harrison Green to The Frantz Corporation, a Wyoming corporation, and to this plaintiff jointly, which said assignment was duly and regularly approved by the Department of the Interior; that copies of said lease and of said assignment are hereto attached and hereof made a part and are marked Exhibit A and B respectively;

IV. That prior to the execution of said lease and ever since the execution thereof, this plaintiff has been operating and is the sole and exclusive operator of all the lands and premises included within said lease except

The Northwest Quarter of the Northeast Quarter (N. W. ¼ N. E. ¼) of Section Fourteen (14), Township Fifteen (15) North, Range Twenty-nine (29) East,

which said lands and premises have been operated, and are now being operated by the above named The Frantz Corporation, and that this plaintiff has now developed upon the lands included within said lease being operated by it and has now in operation thereupon 3 producing wells, producing crude petroleum to the average amount of 321.5 barrels per day since the first day of January, 1921;

V. That the lands and premises hereinabove described from a part of the homestead entry of the said Harrison Green, made under and pursuant to, the homestead laws of the United States of America, and that no patent for said lands has yet issued to said Harrison [fol. 5] Green, and that the title to said lands is now in the United States of America;

VI. That under the terms of said lease so issued by the United States of America to the said Harrison Green as aforesaid, there is reserved to the United States of America a rental of One Dollar ($1.00) per acre per annum upon all of said lands, together with a royalty of five per cent (5%) of all oil or gas produced from said lands and premises, exclusive of such oil or gas as shall be unavoidably lost or used for production purposes thereupon; that under the terms of the said lease there is reserved to the United States of America, the right to take and receive such royalty in money from the proceeds of the sale of such production or to take and receive such royalty in

kind, and that the said United States of America has now elected to take and receive its royalty in kind;

VII. That under the terms of the said assignment from the said Harrison Green to the said The Frantz Corporation and this plaintiff as aforesaid, there is reserved to the said Harrison Green, a royalty of eight per cent (8%) of the gross production of oil or gas from said lands and premises, and that this plaintiff is now and ever since the First day of January, 1921, has been, by virtue of certain agreements, paying additional royalties to divers and sundry persons upon the gross production of oil from said lands and premises, to the amount of five and three-fourths per cent (5¾%); that by virtue of a certain written agreement made and entered into between this plaintiff and others and under which this plaintiff is operating said lands, the plaintiff receives from production from said lands and premises one-third (⅓) of the net proceeds derived from the sale of oil produced therefrom after the payment of all royalties above referred to, including the royalty to the United States of America and after the deduction of all costs and expenses of development and operation;

[fol. 6] VIII. That upon the 24th day of January, 1921, the Government of the United States of America issued to one Matthias W. Wildschutz, a certain Oil and Gas Lease under the terms and in accordance with the provisions of Section 20 of the Act of Congress approved February 25th, 1920, (Public #146) and commonly known as the "Leasing Law," which said lease so issued as aforesaid covers and includes the following described lands and premises, to-wit:

The Northwest Quarter of the Northwest Quarter (N. W. ¼ N. W. ¼) of Section Thirteen (13), the East Half of the Northeast Quarter (E. ½ N. E. ¼) and the Northeast Quarter of the Southeast Quarter (N. E. ¼ S. E. ¼) of Section Fourteen (14), Township Fifteen (15) North, Range Twenty-nine (29) East of the Montana Principal Meridian in Fergus County, Montana;

and which said lease was duly and regularly assigned by the said Matthias W. Wildschutz to The Frantz Corporation, a Wyoming corporation, and The Midwest Refining Company, a Maine corporation, jointly, which said assignment was duly and regularly approved by the Department of the Interior and that said lease and said assignment are in the same terms and to the same effect as Exhibit A and B hereunto attached, except as to the names of the Lessee and the assignees, respectively; that thereafter the said The Midwest Refining Company did duly and regularly assign all of its interest in said lease unto this plaintiff and this plaintiff is now the owner and holder thereof;

IX. That prior to the execution of said last named lease and ever since the execution thereof, this plaintiff has been operating and is the sole and exclusive operator of the following described lands and premises included within said lease, to-wit:

The Northwest Quarter of the Northwest Quarter (N. W. ¼ N. W. ¼) of Section Thirteen (13), Township Fifteen (15) North, Range Twenty-nine (29) East, in Fergus County, Montana;

and has now developed and has now in operation thereupon 3 produc-
[fol. 7] ing wells, producing crude petroleum to the average amount of 491.5 barrles per day since the First day of January, 1921;

X. That the lands and premises last above descrbed form a part of the homestead entry of the said Matthias W. Wildschutz, made under and pursuant to the homestead laws of the United States of America, and that no patent for said lands has yet issued to the said Matthias W. Wildschutz and that title to said lands is now in the United States of America;

XI. That under the terms of said lease last above referred to, so issued by the United States of America to the said Matthias W. Wildschutz, there is reserved to the United States of America, a rental of One Dollar ($1.00) per acre per annum upon all of the lands included therein, together with a royalty of five per cent (5%) of all oil or gas produced from said lands and premises, exclusive of such oil or gas as shall be unavoidably lost or used for production purposes thereupon; that under the terms of said lease last above referred to, there is reserved to the said United States of America the right to take and receive such royalty in money from the proceeds of the sale of such production, or to take and receive such royalty in kind, and that the United States of America has now elected to take and receive its royalty in kind;

XII. That under the terms of the said assignment from the said Matthias W. Wildschutz to the said The Frantz Corporation and The Midwest Refining Company and through the said The Midwest Refining Company to this plaintiff as aforesaid, there is reserved to the said Matthias W. Wildschutz a royalty of six per cent (6%) of the gross production of oil or gas from said lands and premises and that this plaintiff is now, and ever since the First day of January, 1921, has been, by virtue of certain agreements, paying addi-
[fol. 8] tional royalties to divers and sundry persons upon the gross production of oil from said lands and premises to the amount of six and one-fourth per cent (6¼%); that under an agreement with the said The Frantz Corporation, and by virtue of which this plaintiff is operating said lands last specifically above described, this plaintiff receives from the production from said lands and premises one-half (½) of the net proceeds derived from the sale of oil produced therefrom after the payment of all royalties above referred to, including the royalty to the United States of America and after the deduction of all costs and expenses of development and operation;

XIII. That upon the 9th day of September, 1920, the Government of the United States of America issued to C. M. Jacobs and others a certain Oil and Gas Lease under the terms and in accordance

with the provisions of Section 19 of the Act of Congress approved February 25th, 1920 (Public #146) and commonly known as the "Leasing Law," which said lease so issued as aforesaid, covers and includes the following described lands and premises, to-wit:

The Southwest Quarter of the Northwest Quarter (S. W. ¼ N. W. ¼) of Section Thirteen (13), Township Fifteen (15) North, Range Twenty-nine (29) East of the Montana Principal Meridian in Fergus County, Montana,

and which said lease was duly and regularly assigned by the said C. M. Jacobs and others, the lessees therein named, unto The Frantz Corporation aforesaid and this plaintiff jointly, which assignment was duly and regularly approved by the Department of the Interior; that said lease and assignment last above referred to are in the same terms and are to the same effect as Exhibits A and B hereto attached, except as to the lessees and the provisions as to the amount of royalty payable to the United States Government; that prior to the execution of said last named lease and ever since the execution thereof, this plaintiff has been operating and is the sole and exclusive operator of the lands and premises included therein, and has [fol. 9] now developed and has now in operation thereupon two (2) producing wells, producing crude petroleum to the average amount of 231.6 barrels per day since the First day of January, 1921.

XIV. That the lands and premises last above described form a part of the stock raising homestead entry of one James Bland Catlett, made under and pursuant to the Public Land Laws of the United States of America and that no patent of any kind or character has as yet issued to any person upon said lands; that the lease so issued to the said Jacobs and others as aforesaid, was issued to them by virtue of a preference right in said lands and premises acquired by them as locators of a placer mining location upon said lands prior to the passage of said Leasing Law; that the title to said lands last above described is now in the United States of America;

XV. That under the terms of said lease so issued by the United States of America to said C. M. Jacobs and others as aforesaid, there is reserved to the United States of America, a rental of One Dollar ($1.00) per acre per annum upon all of the lands included within said lease, and a royalty of not less than twelve and one-half (12½%) per cent. nor more than twenty-five (25) per cent of all oil or gas produced from said lands and premises, exclusive of such oil or gas as shall be unavoidably lost or used for production purposes thereupon; the percentage of royalty to be paid, being by the terms of such lease, made dependent upon the amount of production from said lands as follows:

"For all oil produced of 30 degrees Baume or over:

On that portion of the average production per well not exceeding 20 barrels per day for the calendar month .	12½%
On that portion of the average production per well of more than 20 barrels and not more than 50 barrels per day for the calendar month	16⅔%
[fol. 10] On that portion of the average production per well of more than 50 barrels and not more than 100 barrels per day for the calendar month	20%
On that portion of the average production per well of more than 100 barrels per day for the calendar month	25%"

that all of the oil produced from said lands has been in excess of 30 degrees Baume and that the average rate of royalty upon production from said land to which the Government has become entitled from the said 9th day of September, 1920 and up to the 31st day of March, 1921, has been approximately twenty-three per cent (23%); that under the terms of said lease last above referred to, there is reserved to the United States of America, the right to take and receive such royalty in money from the proceeds of the sale of such production, or to take and receive such royalty in kind, and that the United States of America has now elected to take and receive its royalty in kind.

XVI. That under the terms of the said assignment from the said C. M. Jacobs and others to the said The Frantz Corporation and this plaintiff as aforesaid, there is reserved to the said lessees, a royalty of five per cent (5%) of the gross production of oil or gas from said lands;

XVII. That by virtue of a certain written agreement made between this plaintiff and others, there is reserved and agreed to be paid to the said James Bland Catlett, a royalty of eight per cent (8%) of the gross production of oil or gas from said lands and that by virtue of an agreement between this plaintiff and the said The Frantz Corporation, this plaintiff is entitled to receive only one-half (½) of the net proceeds derived from the sale of oil or gas produced from said lands and premises after the payment of all royalties above referred to, including the royalty to the United States of America and [fol. 11] after the deduction of all costs and expenses of development and operation.

XVIII. That each and all of the leases above referred to are in good standing and are in full force, effect and operation as between the United States of America and the respective lessee or lessees and their assignees thereunder;

XIX. That by virtue of the orders and directions of the Department of the Interior of the United States of America, the assignees of the several leases hereinabove referred to have made, executed and delivered a bond in the sum of Five Thousand Dollars ($5,000.00) in connection with each of said leases which bond is conditioned for the faithful performance of all of the terms and conditions thereof

and that the bonds so given by such assignees under such leases are now in full force and effect;

XX. That by virtue of the terms and provisions of the Act of Congress approved February 25th, 1920 (Public #146), the title to all oil and gas in and underlying all public lands of the United States of America, including the lands and premises specifically above described, is reserved to and is in the United States of America, and that since the enactment of said Act of Congress, oil or gas can be extracted from public lands only under permit or lease from the United States of America and in conformity with the terms and provisions of such Act of Congress, and the regulations of the Department of the Interior made in connection therewith;

XXI. That this plaintiff has not at any time, either prior or subsequent to the 31st day of March, 1921, or prior to the commencement of this action, produced oil or crude petroleum of any kind whatsoever or in any amount whatsoever from any lands whatsoever within the State of Montana save and except from the lands and premises operated by it under such government leases as aforesaid, [fol. 12] and as specifically above described; and that this plaintiff has not, prior to the commencement of this action, produced any oil or crude petroleum of any kind whatsoever or in any amount whatsoever from any lands within the State of Montana, save and except as an assignee of the lessee or lessees of the United States of America and as the recognized and established agent of the United States of America for the production of oil from said lands and that in prospecting and drilling for and in producing said oil or crude petroleum this plaintiff has at all times acted and is now acting as an agent or instrumentality of the United States of America.

XXIA. That by Section 35 of the Act of Congress of February 25th, 1920, it is provided as follows, to-wit:

"Sec. 35. That 10 per centum of all money received from sales, bonuses, royalties and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to miscellaneous receipts; for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the Act of Congress, known as the Reclamation Act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State [fol. 13] within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct; Provided, That all moneys which may accrue to the United States under the provisions of this Act from lands within the naval petroleum reserves shall be deposited in the Treasury as "Miscellaneous receipts."

That in producing said oil or crude petroleum this plaintiff has at all times acted, and is now acting, as an agent or instrumentality of the United States of America, as aforesaid, and particularly in thus securing for the United States of America the rents and royalties provided for by the terms of said leases hereinabove referred to, the division of which royalties is provided for as hereinabove set forth in said Section 35 of said Act of Congress of February 25th, 1920.

XXII. That during the Seventeenth Session of the Legislative Assembly of the State of Montana there was passed and adopted a certain law or measure known as House Bill No. 115 and entitled: "An act requiring every person, firm, co-partnership, association, joint-stock company, syndicate and corporation engaged in or carrying on the business of producing within this State petroleum or other mineral or crude oil, or engaged in or carrying on the business of owning, controlling, managing, leasing or operating within this State any well or wells from which petroleum or other mineral or crude oil is produced, to pay to the State Treasurer for engaging in and carrying on such business, certain license fees for the exclusive use and benefit of the State of Montana; Fixing the amount of such license fees; prescribing a method for the assessment and collection thereof; and prescribing penalties for violations of the provisions of this Act," which said law or measure was approved by the Governor [fol. 14] of the State of Montana upon the 18th day of March, 1921; that this plaintiff has, prior to the commencement of this action, prepared and filed with the defendant Treasurer of the State of Montana the return provided for in said law, showing the gross production of crude petroleum produced by this plaintiff from the lands operated by it under government lease as aforesaid, for the quarter ending March 31st, 1921, and that a copy of said return so made and filed as aforesaid is hereto attached and made a part hereof and marked "Exhibit C," but that plaintiff has not paid or tendered the amount claimed to be due as a license tax under said law or measure upon said production in accordance with said return or otherwise or at all, but that on the contrary this plaintiff has refused and now refuses to make such payment of such license tax upon the ground and for the reasons hereinafter alleged;

XXIII. That the above named defendants are now attempting and now threaten to exact and collect from this plaintiff a license fee or tax equal in amount to the value of one per cent (1%) of all the crude petroleum produced by this plaintiff from the lands and premises above described as being operated by this plaintiff since the First day of January, 1921, and to and including the 31st day of March, 1921, except so much of said petroleum as may have been used by this plaintiff in connection with the operation of the well from which the same were produced or for pumping such petroleum from such wells to tankage or to a pipe line, the value of such oil upon which said defendants seek to base such license fee or tax to be fixed as provided by said law or measure and that in pursuance of their efforts to enact and collect such license fee or tax, the said defendant, State Board of Equalization, has made written demand

upon this plaintiff for the making and filing of said return and for the payment of said tax, a copy of said demand being hereto attached and hereof made a part and marked "Exhibit D;" that unless restrained by an order of this Court, the said defendants will proceed [fol. 15] to the collection and enforcement of the payment of said fee or tax and to the collection and enforcement of payment of interest thereupon and the penalties provided in such law from this plaintiff in the event that said license fee or tax be not paid by this plaintiff, and that the said defendants will, unless restrained by an Order of this Court, institute an action or actions against this plaintiff for the collection of said tax, interest and penalties and that these defendants now threaten to and will, unless restrained by an Order of this Court, prosecute this defendant under the penal provisions of said law or measure and will subject or attempt to subject this plaintiff to fine or imprisonment or both for the plaintiff's failure to pay said tax as provided by law and that the imposition of any such fine will be a direct charge upon the property of this plaintiff and will deprive this plaintiff of its property and that the prosecution of such criminal action or actions and the ultimate recovery of a judgment or judgments therein by these defendants, acting by or on behalf of the State of Montana or otherwise will subject this plaintiff to great and irreparable damage and injury;

XXIV. That under the terms and provisions of said act or measure it will be incumbent upon this plaintiff to make return of its gross production from the lands so operated by it as aforesaid for the second quarter of the calendar year of 1921 and for each succeeding quarter thereafter; that the defendants have now made demand on this plaintiff for the furnishing of the statement called for under said act or measure showing and setting forth its gross production for said second quarter of the year 1921, as evidenced by Exhibit "D" hereto attached and hereinbefore referred to, and have now transmitted to this plaintiff blank forms for the making up and furnishing of such statement and that these said defendants have threatened and now threaten that unless this plaintiff shall make and file such report and return for the said second quarter of the year 1921 within the time required by such law or measure [fol. 16] hereinabove referred to, they will proceed to make up and determine the amount of gross production from the lands and premises operated by this plaintiff and to fix and determine the amount of the license tax to be imposed upon this plaintiff for said second quarter of the year 1921 and thereafter will proceed, unless restrained by this Court to enforce the payment of said license tax for said second quarter as computed by said defendants, together with interest and penalties thereupon as provided by law; and that thereafter and for each succeeding quarter these defendants will, unless restrained by this Court, attempt to collect or enforce the payment and collection of the license tax provided by such law or measure, against this plaintiff in like manner with the proceedings hereinbefore now threatened to be taken with respect to reports to be made and the

license fees payable for the second quarter of the year 1921 and that the said defendants, by reason of the acts and things hereinbefore mentioned and referred to are now threatening to interfere with and impede the operations of this plaintiff as such federal instrumentality as aforesaid in the development and operation of the lands of the United States of America and the production of oil and gas therefrom, and unless restrained by an order of this Court will interfere with and impede the operations of this plaintiff in the operation and development of said lands and premises as an agency or instrumentality of the Government of the United States of America, and that these defendants by their acts and conduct as hereinabove set forth are now interfering with and impeding the business operations of this plaintiff as such government agency and instrumentality as aforesaid;

XXV. That these defendants are without right, power or authority to collect or attempt to collect or to enforce or to attempt to enforce the payment of said license fee or tax as against this plaintiff or upon [fol. 17] its production of oil as above set forth or otherwise or at all or to compel this plaintiff to make or file any returns whatsoever as to gross production from wells operated by it as hereinbefore alleged, either for the first quarter of the year 1921 or for any succeeding quarter thereafter or otherwise or at all for that said law or measure under which said defendants are attempting to enforce payment and collection of said license fee or tax and to require the making and filing of said returns as aforesaid, is wholly unconstitutional and void in this to-wit:

(a) That said law or measure seeks by its terms to impose a license fee or tax upon this plaintiff and therefore and through this plaintiff, upon an agency or instrumentality of the United States of America in violation of the constitution of the United States of America;

(b) That said law or measure is in contravention of Paragraph I of the Fourteenth Amendment to the Constitution of the United States of America;

(c) That said law or measure is in contravention of the provisions of Section 11 of Article III of the constitution of the State of Montana;

(d) That said law or measure is in contravention of the provisions of Section- 1, 2, 3, 7, 11, 15 and 16 of Article XII of the constitution of the State of Montana;

XXVI. That this plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays that an Order to Show Cause issue out of this Court directed to these defendants, requiring them and each of them to be and appear before this Court upon a day certain, then and there to show cause, if any there be, why they, the said defend-

ants, their deputies, servants, agents and successors in office, should not be restrained and enjoined from imposing or attempting to im-
[fol. 18] pose, collecting or attempting to collect, enforcing payment or attempting to enforce payment, in any manner whatsoever of any license fee or tax whatsoever upon this plaintiff, under and in accordance with said House Bill No. 115, either for the first quarter of year 1921, or for any succeeding quarter, or from in any manner compelling or attempting to compel, requiring or attempting to require this plaintiff to furnish and file with the defendant State Treasurer of the State of Montana, any return or returns under the provisions of said House Bill No. 115, of its production of crude petroleum from any well or wells operated by it, as in plaintiff's complaint alleged and set forth, and that pending the hearing upon such Order to Show Cause they, the said defendants, be so enjoined and restrained, and that thereupon the final hearing and determination of said cause, said injunction be made perpetual.

That plaintiff have and recover its costs of suit herein, together with such other and further relief as to the Court may seem meet, just and equitable.

Donald Campbell, Attorney for Plaintiff.

Duly verified.

EXHIBIT "A" TO COMPLAINT

Department of the Interior

United States Land Office

Serial No. Lewistown 044660

Lease of Oil and Gas Lands under the Act of February 25, 1920

This indenture of lease entered into, in triplicate, as of the 28th day of January, 1921, by and between the United States of America, party of the first part, hereinafter called the lessor, acting in this behalf by the Secretary of the Interior, and Harrison Green, party of
[fol. 19] the second part, hereinafter called the lessee, under, pursuant and subject to the terms and provisions of the Act of Congress approved February 25, 1920 (Public No. 146), entitled "An Act to Promote the Mining of Coal, Phosphate, Oil, Oil Shale, Gas and Sodium on the Public Domain," hereinafter referred to as the act, which is made a part hereof, witnesseth:

Sec. 1. Purposes.—That the lessor in consideration of rents and royalties to be paid, and the covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove and dispose of all the oil and gas deposits in or under the following described tract of land situated in the Cat Creek Oil Field and more particularly described as follows: SW¼ SE¼ Sec. 11, NW¼ NE¼ and N½ NW¼ Sec. 14, T. 15 N., R. 29 E., M. P. M., Fergus County, Montana, together with

the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof, for a period of twenty (20) years, with the preferential right in the lessee to renew this lease for successive period of ten (10) years, upon such reasonable terms and conditions as may be prescribed by the lessor, unless otherwise provided by law at the time of the expiration of such periods.

Sec. 2. In consideration of the foregoing, the lessee hereby agrees:

(a) Bond.—To furnish a bond with approved corporate surety in the penal sum of $5,000 conditioned upon compliance with the terms of the lease.

(b) Wells.—To maintain in a state of production wells equal in number to the number of the now existing producing wells on the leased land until the oil deposits are exhausted or until the proven territory has been drilled, and in case such existing wells are less [fol. 20] than the number of 40-acre tracts or lots embraced in the lease, to proceed with reasonable diligence within three months of delivery hereof to install on the leased land a standard or other efficient drilling outfit and equipment, and to commence drilling at least one well and to continue such drilling with reasonable diligence to production or to a point where the well is demonstrated unsuccessful, and thereafter to continue drilling with reasonable diligence at least one well at a time until the lessee shall have drilled producing wells which, with any producing wells now on the land, equal in number the number of 40-acre tracts or lots embraced in the leased premises, unless the lessor shall for any reason deemed sufficient consent in writing to the drilling of a less number of wells the lessee further agrees to drill all necessary wells to offset the wells of others on adjoining land or deposits not the property of the United States, and on adjoining land operated under government lease at 5% royalty.

(c) Royalty and Rents.—To pay the lessor in advance, beginning with the date of the execution of this lease, a rental on one dollar per acre per annum during the continuance hereof, the rental so paid for any one year to be credited on the royalty for that year, together with a royalty on all oil from the land leased herein (except oil or gas used for production purposes on said land or unavoidably lost), as follows: Five (5) per centum.

When paid in value, such royalties shall be due and payable monthly on the 15th of each calendar month following the calendar month in which produced, to the Receiver of Public Moneys of the Land District in which the land is situated; when paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced, unless otherwise agreed to by the parties hereto, at such times as may be required by the lessor, provided that the lessee shall not be required to hold such royalty oil in storage longer than thirty days after the end of the calendar month in

which said oil is produced, and provided further, that the said lessee shall be in no manner responsible or held liable for the loss or destruction of such oil in storage from causes over which the lessee has no control; such royalties, whether in value or kind, shall be subject [fol. 21] to reduction whenever the average daily production of any oil well shall not exceed ten (10) barrels per day, if in the judgment of the lessor the wells can not be successfully operated upon the royalties fixed herein.

(d) Sales Contracts.—To file with the Secretary of the Interior copies of all sales contracts for the disposition of oil and gas produced hereunder except for production purposes on the land leased, and in the event the United States shall elect to take its royalties in money instead of in oil or gas, not to sell or otherwise dispose of the products of the land leased except in accordance with a sales contract or other method first approved by the Secretary of the Interior.

(e) Monthly Statements.—To furnish monthly statements in detail in such form as may be prescribed by the lessor, showing the amount, quality and value of all oil and gas produced and saved during the preceding calendar month as the basis for computing the royalty due the lessor. The leased premises and all wells, improvements, machinery, and fixtures thereon or connected therewith and all books and accounts of the lessee shall be open at all times for the inspection of any duly authorized officer of the Department.

(f) Plats and Reports.—To furnish annually and at such times as the Secretary shall require, in the manner and form prescribed by the Secretary of the Interior, a plat showing all development work and improvements on the leased lands, and other related information, with a report as to all buildings, structures, or other works placed in or upon said leased lands, accompanied by a report in detail as to the stockholders, investment, depreciation, and cost of operation, together with a statement as to the amount and grade of oil and gas produced and sold, and the amount received therefor by operations hereunder.

(g) Log of Wells.—To keep a log in the form prescribed by the Secretary of all the wells drilled by the lessee, showing the strata and character of the ground passed through by the drill, which log, or copy thereof, shall be furnished to said lessor on demand.

[fol. 22] (h) Diligence. — Prevention of Waste — Health and Safety of Workmen.—To exercise reasonable diligence in drilling and operating wells for the oil and gas on the lands covered hereby, while such products can be secured in paying quantities, unless consent to suspend operations temporarily is granted by the Secretary of the Interior; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the oil sands or oil bearing strata to the destruction or injury of the oil deposits, the preservation and conservation of the

property for future productive operations, and to the health and safety of workmen and employees, to plug securely any well before abandoning the same so as to effectually shut off all water from the oil or gas bearing strata; not to drill any well within 200 feet of any of the outer boundaries of the lands covered thereby, unless the adjoining lands have been patented or the title thereto otherwise vested in private owners; to conduct all mining, drilling, and related productive operations subject to the inspection of the lessor; to carry out at expense of the lessee all reasonable orders and requirements of lessor relative to prevention of waste, and preservation of the property and the health and safety of workmen, and on failure so to do the lessor shall have the right to enter on the property to repair damage or prevent waste at the lessee's cost; to abide by and conform to regulations in force at the time the lease is granted covering the matters referred to in this paragraph. Provided, that the lessee shall not be held responsible for delays or casualties occasioned by causes beyond lessee's control.

(i) Taxes and Wages—Freedom of Purchase.—To pay when due, all taxes lawfully assessed and levied under the laws of the State upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee; to accord all [fol. 23] workmen and employees complete freedom of purchase, and to pay all wages due workmen and employees at lease twice each month in the lawful money of the United States.

(j) Reserved Deposits.—To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas.

(k) Assignment of Lease.—Not to assign this lease or any interest therein, not sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

(l) Deliver Premises in Case of Forfeiture.—To deliver up the premises leased, with all permanent improvements thereon, in good order and condition in case of forfeiture of this lease, but this shall not be construed to prevent the removal, alteration, or renewal of equipment and improvements in the ordinary course of operations.

Sec. 3. The lessor expressly reserves:

(a) Rights Reserved.—Easements and Rights of Way — The Right to permit for joint or several use easements or rights of way, including easements in tunnels upon, through, or in the lands leased, occupied or used as may be necessary or appropriate to the working of the same or of other lands containing the deposits described in said act, and the treatment and shipment of products thereof by or under authority of the Government, its lessees or permittees, and for other public purposes.

(b) Disposition of Surface.—The right to lease, sell, or otherwise dispose of the surface of the lands embraced within this lease under existing law or laws hereafter enacted in so far as said surface is not necessary for the use of the lessee in the extraction and removal of [fol. 24] the oil and gas therein.

(c) Pipe Lines to Convey at Reasonable Rates.—The right to require the lessee, his assignees, or beneficiary, if owner, or operator of, or owner of a controlling interest in any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands under such lease, to accept and convey at reasonable rates and without discrimination the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of this act.

(d) Monopoly and Fair Prices.—Full power and authority to carry out and enforce all the provisions of Section 30 of the act, to insure the sale of the production of *s*ich leased lands to the United States and to the Public at reasonable prices, to prevent monopoly, and to safeguard the public welfare.

(e) Helium.—Pursuant to section 1 of the act, the lessor reserves the right to take all helium from any gas produced under his lease, but the lessee shall not be required to extract and save the helium for the lessor; in case the lessor elects to take the helium, the lessee shall deliver all gas containing same, or portion thereof desired, to the lessor in the manner required by the lessor, for the extraction of the helium in such plant or reduction works for that purpose as the lessor may provide, whereupon the residue shall be returned to the lessee with no substantial delay in the delivery of gas produced from the well to the purchaser thereof; provided, that the lessee shall not, as a result of the operation in this section provided for, suffer a diminution of value of the gas from which the helium has been extracted, or loss otherwise, for which the lessee is not reasonably compensated, save for the value of the helium extracted; the lessor further reserves the right to erect, maintain, and operate any and all reduction works and other equipment necessary for the extraction of helium on the premises leased.

[fol. 25] Sec. 4. Surrender and Termination of Lease.—The lessee may, on Consent of the Secretary of the Interior first had and obtained in writing, surrender and terminate this lease upon payment of all rents, royalties, and other obligations due and payable to the lessor, and upon payment of all wages and moneys due and payable to the workmen employed by the lessee, and upon a satisfactory showing to the Secretary that the public interest will not be impaired; but in no case shall such termination be effective until the lessee shall have made full provision for conservation and protection of the property; upon like consent had and obtained the lessee may surrender any legal subdivisions of the area included herein.

Sec. 5. Purchase of Materials, etc., on Termination of Lease.—Upon the expiration of this lease, or the earlier termination thereof

pursuant to the last preceding section, the lessor or another lessee may, if the lessor shall so elect within six months from the termination of the lease, purchase all materials, tools, machinery, appliances, structures, and equipment placed in or upon the land by the lessee, and in use thereon as a necessary or useful part of an operating or producing plant, on the payment to the lessee of such sum as may be fixed as a reasonable price therefor by a board of three appraisers, one of whom shall be chosen by the lessor, one by the lessee, and the other two by the two so chosen; pending such election all equipment shall remain in normal position. If the lessor, or another lessee, shall not, within six months, elect to purchase all or any part of such materials, tools, machinery, appliances, structures, and equipment, the lessee shall have the right at any time, within ninety days, to remove from the premises all the materials, tools, machinery, appliances, structures, and equipment which the lessor shall not have elected to purchase, save and except casing in wells and other equipment or apparatus necessary for the preservation of the well or wells.

Sec. 6. Judicial Proceedings in Case of Default.—If the lessee shall fail to comply with the provisions of the act, or make default in the performance or observance of any of the terms, covenants, and stipu-[fol. 25] lations hereof, or of the general regulations promulgated and in force at the date hereof, and such default shall continue after service of written notice thereof by the lessor, then the lessor may institute appropriate judicial proceedings for the forfeiture and cancellation of this lease in accordance with the provisions of Section 31 of said act; but this provision shall not be construed to prevent the exercise by the lessor of any legal or equitable remedy which the lessor might otherwise hav[illegible] A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeituure of this lease for any other cause of forfeiture, or for the same cause occurring at any other time.

Sec. 7. Heirs and Successors in Interest.—It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto.

Sec. 9. Unlawful Interest.—It is also further agreed that no Member of, or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified, and during his continuance in office, and that no officer, agent, or employee of the Department of the Interior shall be admitted to any share or part of this lease or derive any benefit that may arise therefrom; and the provisions of section 3741 of the Revised Statutes of the United States, and sections 114, 115 and 116 of the Codification of the Penal Laws of the United States approved March 4, 1919 (35 Stat., 1109), relating to contracts enter into and form a part of this lease so far as the same may be applicable.

In witness whereof

The United States of America, by John Barton Payne, Secretary of the Interior. Harrison Green, by Donald Campbell, His Atty. in Fact. Witness to signature of Donald Campbell: James T. Stanley.

[fol. 27] "EXHIBIT B" TO COMPLAINT

Department of the Interior

United States Land Office

Lewistown, Montana, Serial No. 044660

Assignment

Whereas, the undersigned Harrison Green has entered into an oil and gas lease under the Act of Congress of February 25, 1920, with the United States of America, upon the lands hereinafter described; and

Whereas, the said undersigned Harrison Green did, upon the 21st day of April, 1920, enter into a certain operating contract with one J. F. Forbes, of Lewistown, Montana, in which said contract B. N. Forbes, W. H. Forbes, Harry H. Schwartz, Jr., and Herbert A. Hover, did by assignment from the said J. F. Forbes, acquire an interest; and

Whereas, the said J. F. Forbes and his associates hereinabove named did, upon the 23rd day of August, 1920, assign all of their right, title and interest in and to the operating contract above referred to unto the Midwest Refining Company, a Maine corporation, and Frank Frantz, of Denver, Colorado, and did upon said last named date enter into a certain agreement for the drilling and operation of the lands hereinafter referred to; and

Whereas, the said Midwest Refining Company and the said Frank Frantz have assigned all of their respective interest in said drilling contract last above referred to unto the Mid-Northern Oil Company, a Montana corporation, and The Frantz Corporation, a Wyoming corporation; and the said two corporations last above named are now the holders of the entire operating interest in said lands and premises hereinafter described, all as more fully appeared from the application for lease so made and filed herein by the said Harrison Green; and

[fol. 28] Whereas, the said Harrison Green has retained and now retains a royalty interest in said lands hereinafter described equivalent to eight per cent of the gross proceeds of all oil or gas produced from said lands; and

Whereas, it is the desire and purpose of the said undersigned Harrison Green to transfer and assign unto the said Mid-Northern Oil

Company and The Frantz Corporation the said lease from the said United States of America, subject to the terms and conditions of said operation contracts aforesaid, and with the reservation to himself of the said royalty of eight per cent;

Now therefore for and in consideration of the sum of One Dollar ($1.00) to the undersigned Harrison Green in hand paid by the Mid-Northern Oil Company and The Frantz Corporation, receipt whereof is hereby acknowledged, the undersigned Harrison Green has assigned and transferred, and does hereby assign and transfer unto the Mid-Northern Oil Company and The Frantz Corporation in equal proportion, share and share alike, all of his right, title and interest in and to the said oil and gas lease from the United States of America, upon the lands therein described and herein described, as follows, to-wit: The S. W. qr. of the S. E. qr. of Section 11; the N. W. qr. of the N. E. qr., and the north half of the N. W. qr. of Section 14,—all in Tp. 15, North, Range 29 East of the Montana principal meridian, in Fergus County, Montana, subject, however, to the terms and provisions of the said contracts hereinabove referred to, and subject to the reservation unto himself of eight per cent royalty in the gross proceeds of all oil and gas produced from said lands;

In consideration of the foregoing assignment of said lease and of the approval of said assignment and consent thereto by the Secretary of the Interior, the said assignees hereby covenant and agree with the said assignor and also with the United States of America fully to keep and perform upon their part, jointly and severally as to the lands covered by this assignment, all of the terms, conditions, stipulations, covenants, promises and agreements of said lease required to be kept and performed by the said assignor, the lessee named in said lease; and the assignees hereby assume all of the terms covenants and obligations of said lease as fully and to the same effect as if said assignees were named in and had executed said lease or leases.

[fol. 29] In witness whereof, the said Harrison Green has signed and executed this instrument by his duly and regularly authorized attorney in fact, and the Mid-Northern Oil Company, and The Frantz Corporation have caused this instrument to be signed and executed by their duly and regularly authorized attorneys in fact, respectively, this 26th day of January, 1921.

Harrison Green (Seal), by Donald Campbell, His Attorney in Fact. Mid-Northern Oil Company (Seal), by Donald Campbell, Its Attorney in Fact. The Frantz Corporation (Seal), by Donald Campbell, Its Attorney in Fact. Witnesses: —— ——.

The foregoing assignment is hereby consented to and approved this 28th day of January, 1921.

The United States of America, by John Barton Payne, Secretary of the Interior.

[fol. 30] "EXHIBIT C" TO COMPLAINT

State of Montana

Oil Production License Tax

(Chap. 266, Laws 1921)

Statement of Production and License Tax for Quarter Year Ending March 31, 1921

Name: Mid-Northern Oil Co.; Address: Billings, Montana.

Name and Location of Producing Wells in Montana

Green Well No. 1—N. E. ¼ of N. W. ¼, Sec. 14, T. 15 N. R. 29 E.

Green Well No. 3—S. W. ¼ of S. E. ¼, Sec. 11, T. 15 N. R. 29 E.

Catlett Well Nos. 1 and 2—S. W. ¼ of N. W. ¼, Sec. 13, T. 15 N. R. 29 E.

Wildschultz Well Nos. 1, 2 and 3—N. W. ¼ of N. W. ¼, Sec. 13, T. 15 N. R. 29 E.

Production and Gross Value

Month	Number bbls. oil produced and saved	Number bbls. oil used in carrying on operations	Number bbls. oil for market	Average price per bbl.	Total value oil for market
Jan. 1921.....	20,671.98	1,769.00	18,902.98	$2.927	$55,329.07
Feb. 1921.....	48,044.98	1,075.00	46,969.98	1.788	83,991.84
Mar. 1921.....	35,277.52	1,626.75	33,650.77	1.75	58,888.85
Total for quarter year ending Mar. 31st, 1921	103,994.48	4,470.75	99,523.73	.....	$198,209.76

License Tax Due for Quarter

One per cent of $198,209.76 total value of oil produced during quarter year for market, $1,982.10.

Dated at Billings, Montana, June 25th, 1921.

[fol. 31] (Signed) Mid-Northern Oil Co., by Julian D. Thomas, Treasurer and Auditor. Attest: D. B. Boyd, Secretary. (Seal.)

STATE OF MONTANA,
County of Yellowstone, ss:

Julian D. Thomas being first duly sworn according to law deposes and says: That he is Treasurer and Auditor of the Mid-Northern Oil Co., and that he has read the foregoing statement and knows the

contents thereof, and that the statements, and all thereof, contained therein are true.

Julian D. Thomas.

Subscribed and sworn to before me this 25th day of June, 1921. Elgy N. Smith, Notary Public for the State of Montana, residing at Billings, Montana. My Commission expires May 24th, 1923.

"Exhibit D" to Complaint

Form A-1-2, C-1-2, E-1-2

Office of State Board of Equalization, Helena, Montana

"Certificate and Statement" and "Statement or Production and License Tax" were sent you from this office to be filled out and filed as required by law by legislative enactment of 1921, but complete return has not been made by you for the quarter ending March 31, [fol. 32] 1921. Failure to make such return on or before July 1, 1921, makes you subject to the penalty which reads as follows:

"And violation of any of the provisions of this Act shall be deemed a misdemeanor, and shall be punished by a fine of not exceeding One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for not exceeding Six (6) Months, or by both fine and imprisonment."

This matter should receive your prompt attention, "Statement of Production and License Tax" blanks for the second quarter are inclosed.

Very truly yours, State Board of Equalization.

[File endorsement omitted.]

District Court of Lewis and Clark County

Order to Show Cause and Temporary Restraining Order—Filed July 20, 1921

Upon reading and filing the complaint in the above entitled cause and it appearing to me therefrom the proper grounds are therein alleged for the granting of an order to show cause herein, requiring you, the above named defendants, to appear before this court and show cause why you should not be restrained and enjoined from doing the acts and things set forth and alleged in plaintiff's complaint, and in the meantime restraining and enjoining you, the said defendants, from attempting to enforce the provisions of House Bill No. 115 as against the plaintiff in this action;

Now therefore, it is hereby ordered that you, the above named defendants, do be and appear before this court in the court room thereof at the city of Helena, County of Lewis and Clark, State of Montana, on the 16th day of July, 1921, then and there to show cause, if any you have, why you, the said defendants, should not be restrained and enjoined from imposing or attempting to impose, [fol. 33] collecting or attempting to collect, enforcing payment or attempting to enforce payment in any manner whatsoever of any license fee or tax whatsoever upon this plaintiff under and in accordance with the provisions of House Bill No. 115, either for the first quarter of the year 1921 or for any succeeding quarter, or from in any manner compelling or attempting to compel, requiring or attempting to require this plaintiff to furnish and file with the State Treasurer of the State of Montana any return or returns under the provisions of said House Bill No. 115 of plaintiff's production of crude petroleum from any well or wells operated by it, or from in any manner whatsoever requiring this plaintiff to comply with any of the requirements of said House Bill No. 115;

And it is further ordered that pending the hearing upon this order to show cause you, the said defendants, and each of you, your deputies, servants, agents and successors in office, be and you are hereby restrained and enjoined from imposing or attempting to impose, collect or attempting to collect, enforcing payment or attempting to enforce payment in any manner whatsoever of any license fee or tax whatsoever upon this plaintiff under and in accordance with said House Bill No. 115, either for the first quarter of the year 1921 or for any succeeding quarter and until further order of this court, or from in any manner compelling or attempting to compel, requiring or attempting to require, this plaintiff to furnish and file with the State Treasurer of the State of Montana, any return or returns under the provisions of said House Bill No. 115, of plaintiff's production of crude petroleum from any well or wells operated by it or from in any manner whatsoever, and until further order of this court, require this plaintiff to comply with any of the requirements of said House Bill No. 115.

Done in open court this 2nd day of July, 1921.

A. J. Horsky, Judge. Attest: Will Whalen, Clerk of District Court. (Seal.)

[fol. 34] Due service of the foregoing order to show cause and temporary restraining order is hereby admitted upon all defendants this 2nd day of July, 1921.

Wellington D. Rankin, Attorney General.

[File endorsement omitted.]

DISTRICT COURT OF LEWIS AND CLARK COUNTY

DEMURRER—Filed July 21, 1921

Come now the defendants above named and demur to the complaint of the plaintiff on file herein upon the ground and for the reason that said complaint does not state facts sufficient to constitute a cause of action against these defendants or any of them.

Wellington D. Rankin, Attorney General of the State of Montana, Attorney for Defendants.

[File endorsement omitted.]

DISTRICT COURT OF LEWIS AND CLARK COUNTY

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Come now the defendants in the above entitled action and move the Court to dissolve the Temporary Injunction Order heretofore entered herein upon the ground and for the reason that the complaint of the plaintiff does not state facts sufficient to constitute a cause of action against the defendants or any of them.

Wellington D. Rankin, Attorney General of the State of Montana, Attorney for Defendants.

[fol. 35] [File endorsement omitted]

IN DISTRICT COURT OF LEWIS AND CLARK COUNTY

ORDER SUSTAINING DEMURRER

Done in open Court February 16th, 1923.

Pursuant to remittitur from Supreme Court filed herein, the demurrer interposed to the complaint and the motion to dissolve injunction are sustained. Thereupon, counsel for plaintiff waived the time provided by the rules of this court to amend his complaint. The plaintiff was thereupon ordered to plead further instanter, and refusing to do so, Court ordered the default of the plaintiff entered. Thereupon Court ordered Judgment entered herein to the effect that the plaintiff take nothing in this action and that the defendants recover from the plaintiff their costs incurred herein.

A. J. Horsky, Judge.

IN DISTRICT COURT OF LEWIS AND CLARK COUNTY

JUDGMENT—Filed February 16, 1923

The demurrer of the defendants having been submitted to this court and sustained, and the defendants' motion to quash the restraining order having been granted, and the plaintiff having declined to

amend its complaint or to plead further in said cause within the time allowed by the court therefor, and the said plaintiff having waived the time within which to amend its complaint or to plead further, and the default of the plaintiff for failure to amend its complaint or to further plead having been duly entered according to law;

It is hereby ordered, adjudged and decreed that plaintiff take nothing by its action.

It is further ordered, adjudged and decreed that the defendants do have and recover from the plaintiff their costs incurred in said action, and taxed in the sum of thirty & 40/100 Dollars ($30.40).

[fol. 36] Dated this 16th day of February, 1923.

A. J. Horsky, District Judge.

[File endorsement omitted.]

In District Court of Lewis and Clark County

Notice of Appeal—Filed March 2, 1923

To the above named defendants, and to Wellington D. Rankin, Attorney General for the State of Montana, and attorney for said defendants:

You and each of you will please take notice that the plaintiff in the above entitled action hereby appeals to the Supreme Court of the State of Montana from the Judgment entered, given and made in the above entitled cause, in said District Court, upon the 16th day of February A. D. 1923, in favor of said defendants and against this plaintiff, decreeing that plaintiff have and take nothing by its action, and dismissing the plaintiff's cause of action, and awarding to the defendants their costs, and from the whole of said Judgment.

Dated this 28th day of February A. D. 1923.

Donald Campbell, Attorney for Plaintiff.

[File endorsement omitted.]

That thereafter and within five (5) days after the filing of said Notice of Appeal plaintiff herein filed its undertaking on appeal in manner and form as required by law.

In District Court of Lewis and Clark County

Præcipe for Transcript of Record

To Will Whalen, Esq., Clerk of the above named Court:

You will please forthwith prepare and certify the transcript on appeal in the above entitled cause, said transcript to contain the

judgment roll (consisting of the complaint, order to show cause, temporary restraining order, demurrer, motion to dissolve temporary [fol. 37] restraining order, minutes of the Court sustaining demurrer and motion and judgment for defendants); also plaintiff's notice of appeal, certifying said transcript as required by law and the rules of the Supreme Court.

Dated at Forsyth, Montana, this 31 day of May, 1923.

Donald Campbell, Attorney for Plaintiff.

STATE OF MONTANA,
County of Lewis and Clark, ss:

CLERK'S CERTICATE

I, Will Whalen, Clerk of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, do hereby certify and declare that the foregoing 42 pages constitute and are a full, true and correct copy of the transcript of the judgment roll consisting of the complaint, order to show cause, temporary restraining order, demurrer, motion to dissolve temporary restraining order, minutes of the Court sustaining demurrer and motion and judgment for defendants, and the notice of appeal, all as filed and of record in the above entitled cause wherein the Mid-Northern Oil Co., is plaintiff and J. W. Walker, as Treasurer of the State of Montana, Joseph M. Dixon, Governor of the State of Montana, C. T. Stewart, Secretary of State of the State of Montana, J. W. Walker, Treasurer of the State of Montana, George P. Porter, Auditor of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, as the State Board of Equalization of the State of Montana, are defendants, known as No. 11,116 on the calendar of said Court;

I further certify that a good and sufficient undertaking on appeal in manner and form as required by law was filed in said cause upon the 2nd day of March, 1923.

[fol. 38] In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 31st day of May, 1923.

Will Whalen, Clerk of the District Court.

[File endorsement omitted.]

[fol. 39] [File endorsement omitted]

STATE OF MONTANA:

IN THE SUPREME COURT, OCTOBER TERM 1923

[Title omitted]

Submitted October 26, 1923. Decided October 31, 1923

[fol. 40] OPINION PER CURIAM—Filed October 31, 1923

This cause was before the court during the December, 1922, term (65 Mont. 414, 211 Pac. 353).

When the remittitur went down the district court sustained defendants' demurrer agreeably to the direction of this court. The plaintiff refused to plead further, whereupon judgment was entered in favor of defendants, and from that judgment the plaintiff has appealed.

By agreement of counsel the briefs which were filed in the former appeal have been used in this one. These have been supported by oral argument.

Further consideration only serves to satisfy us that the opinion delivered when the cause was here before is correct, and, except as to the concluding paragraph which gives directions to the court below, we now adopt it in full as our opinion in the instant case.

The judgment is affirmed.

Affirmed.

[fol. 41] [File endorsement omitted]

STATE OF MONTANA:

IN THE SUPREME COURT, DECEMBER TERM, 1922

[Title omitted]

Submitted November 27, 1922. Decided December 18, 1922

OPINION—Filed December 18, 1922

[fol. 42] Mr. Justice HOLLOWAY delivered the Opinion of the Court.

By Chapter 266, Laws of 1921, (Secs. 2397-2408, Rev. Codes 1921) every person engaged in producing petroleum or other mineral or crude oil within this state is required to pay to the state annually a license tax equal to one per centum of the gross value of the oil so produced during the year. The Mid-Northern Oil Co. is a domestic corporation actively engaged in the production of crude petro-

leum within this state but claims exemption from the operation of the statute above. It refuses to pay the tax, and, to avoid a multiplicity of suits and as well the penalty provided by the Act for refusal to pay, instituted this suit to secure an injunction restraining the members of the State Board of Equalization from enforcing the statute against it. The trial court rendered and had entered a judgment granting to plaintiff the relief sought, and the defendants appealed.

The essential facts involved here are these: Pursuant to the terms of the Federal Oil and Gas Leasing Law (Act of February 25, 1920), the government of the United States executed and delivered to certain individuals, leases under the terms of which the respective lessees were given the exclusive right to explore for, extract and dispose of oil and gas in lands covered by homestead entries for which patents had not issued. The plaintiff is the owner, in whole or in part, of these leases by assignments which have been duly approved by the Land Department, and in the production of oil its operations are confined exclusively to the lands mentioned in the leases.

There cannot be any controversy over the character of the tax involved. The statute declares that it is imposed "for engaging in and carrying on such business" and that the tax, when collected, shall become a part of the general fund of the state. The tax is not in any sense a property tax, and neither is it exacted for regulatory purposes under the police power. The statute is a revenue measure and the exaction is a license or occupation tax. (State v. Camp Sing, 18 Mont. 182, 44 Pac. 516; Northwestern Mutual Life Ins. Co. v. Lewis and Clark County, 28 Mont. 484, 72 Pac. 982; State v. Hammond Packing Co., 45 Mont. 343, 123 Pac. 407; s. c. 233 U. S. 331; Equitable Life Assurance Co. v. Hart, 55 Mont. 76, 183 Pac. 1062.)

We enter upon our investigation of this subject confronted by the declaration of our state Constitution that the legislative assembly may impose a license tax upon persons and corporations doing business in the State (sec. 1, Art. XII) and by the principle well nigh universally recognized "that taxation is the rule and exemption the exception." (Cruse v. Fischel, 55 Mont. 258, 175 Pac. 878.) Since plaintiff is doing business in this state, the burden is upon it to show that it comes within some definite exception to the general rule. The right to impose an occupation tax upon it is denied by the plaintiff upon the theory that in carrying out its leases it acts as an agent for or instrumentality of the United States in the disposition of the public lands. In McCulloch v. Maryland, 4 Wheat. 316, decided in 1819, the Supreme Court of the United States held that a state may not exact a tax upon the operations of a branch of the United States bank no matter how reasonable or universal or undiscriminating the tax may be. The decision had its foundation in the entire absence of power on the part of the state to interfere with or control a governmental instrumentality of the United States. That doctrine has been reiterated in numberless cases down to and including Johnson v. Maryland, 254 U. S. 51, decided in 1920. In this last case it was held that a postal employee in the discharge of

his duties delivering mail by means of a government owned motor truck cannot be required to procure a motor vehicle license from the state after demonstrating his competency to operate the machine and the payment of a prescribed fee. (See also Farmer's Bank v. Minnesota, 232 U. S. 516.) Whatever difference of opinion may have been entertained upon the question heretofore, we think it may be accepted as settled now that a state may not, without the consent of Congress, impose a tax upon the operations of any means, agency [fol. 43] or instrumentality of the United States through which the government performs its public functions, and that the character of the tax or the extent of the burden it imposes is altogether immaterial. The distinction between a tax upon the operations of an agency of government and a property tax is to be kept in mind. That the state may impose a general ad valorem tax upon the private property of an agency of the government has been declared so often that it has become axiomatic.

With these principles before us, our attention is concentrated upon the decisive question presented by this appeal: Is the Mid-Northern Oil Company, in the execution of its leases, such an agency or instrumentality of the United States as that this state may not exact of it an occupation tax? Plaintiff insists that the question has been set at rest by the recent decisions of the Supreme Court of the United States in the Oklahoma cases and a brief review of those cases will serve to illustrate the contention.

In Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, there was drawn in question the right of the state of Oklahoma to collect from the railroad company an occupation tax computed upon the gross sales of coal mined by the railroad company from unallotted lands belonging to the Choctaw Indian tribes, under leases authorized by Congress. The court held that the agreement between the United States and the Indians imposed upon the former a definite duty in respect to opening and operating the coal mines upon the Indian lands, and held further that the railroad company "is the instrumentality through which this obligation is being carried into effect," and that "such an agency cannot be subjected to an occupation or privilege tax by a state."

In Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, the facts appeared to be that the oil company, by approved assignment from the original lessee, became the owner of a lease from the Osage Indians to prospect for and produce petroleum and natural gas in lands belonging to the Indians in the Osage Reservation. The state of Oklahoma undertook to subject that lease, and subleases held by the oil company, to general taxation for state, county and other purposes, either as a specie of property or as the measure of the value of property subject to taxation. The court held that the state could not tax property under the protection of the federal government and that the leases in question "have the immunity of such protection." Concluding its opinion the court said: "It follows from these views that the assessment against the oil company so far as it included the leases here as separate objects of taxation or as represented or valued by the stock of the company is invalid."

The same principle was applied to gross production taxes in Howard v. Gypsey Oil Co., 247 U. S. 503 and in Large Oil Co. v. Howard, 248 U. S. 549.

Finally, in Gillespie v. Oklahoma, decided January 30, 1922, there was presented the contention by the state of Oklahoma that it might exact a tax from a lessee of Indian lands based upon the net income derived from his operations under leases similar to those involved in Choctaw O. & G. R. Co. v. Harrison and in Indian Territory Illuminating Oil Co. v. Oklahoma, above, but its claim was denied. The Court said: "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases, and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the efforts of the United States to make the best terms that it can for its wards."

As we understand these decisions, the exemption in each instance was based solely upon the peculiar character of the lease involved and not upon the fact that the individual or corporation benefited was a lessee of the government. In other words, the court did not [fol. 44] hold that every individual or corporation having a lease upon public land is ipso facto an agent or instrumentality through which the government executes its power to dispose of the public lands, but it did hold that the fiduciary relationship existing between the United States and the particular Indian wards imposed upon the government a positive duty to lease the Indian lands and to secure for the Indians the most advantageous terms available; that in the discharge of its duty the government approved the leases in question and chose the lessee in each instance as its agent or instrumentality through which it carried its leases into execution and thereby discharged its public duty.

It cannot be contended that every individual or corporation having a contract with the United States is by force of that fact alone an essential governmental agency immune to interference by the state in which the operations under the contract are carried out. In Baltimore Shipbuilding & Dry Dock Co. vs. Baltimore, 195 U. S. 373, the facts were there: The United States conveyed to the dry dock company lands formerly within the Fort McHenry Reservation. By the terms of the grant the purchaser was required, among other things, to construct a dry dock and to permit the government to use it free of charge. The grant provided, also, that if the purchaser failed to carry out the terms of the grant, the land should revert to the government. The dry dock company claimed exemption from local taxation, first, because the tax was imposed upon land in which the United States had an interest, and, second, because the land was an instrumentality through which the government executed its powers. With respect to the first contention the court held that it was only the interest of the dry dock company that was subjected to taxation, and the second contention was denied altogether. Concerning it the court said: "It seems to us extravagant to say that an independent private corporation fro- gain created by a state, is exempt from state taxation either in its corporation person or its property because it is employed by the United States, even if

the work for which it is employed is important and takes much of its time."

In Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319, the facts involved were that the depository company, a Maryland corporation, licensed to transact business in Pennsylvania, was also authorized by federal statute to become surety upon bonds, undertakings and recognizances required of federal officers in Pennsylvania or in litigation pending in that state. It executed such bonds for which the government paid it something over $17,000 in premiums during the year 1909. The state of Pennsylvania undertook to exact an occupation tax equal to two per centum upon the gross premiums received from business done within the state, and payment of the tax was resisted so far, at least, as it related to premiums received from the United States upon the theory that with respect to the bonds furnished the United States, the deposit company was an instrumentality of the general government and exempt from taxation for doing the business which the Congress had authorized it to do. The claimed immunity was denied, and concerning the relationship of the Company to the United States, the Court said: "But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control." (See also Choctaw O. & G. R. Co. v. Mackey, 259 U. S. 531.)

In these cases we think the Supreme Court of the United States has recognized a distinction between an agency or instrumentality through which governmental powers are executed and an agency employed or made use of by the government as a mere incident to the discharge of some of its functions, and support for this view is found in Flint v. Stone Tracy Co. 220 U. S. 107. It was said: "It has been held in a number of cases that the state cannot tax franchises created by the United States or the agencies or corporations which are created for the purpose of carrying out governmental [fol. 45] functions of the United States (citing cases). An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the federal government in its sovereign capacity, and the attempted taxation was an interference with the "effectual exercise of such powers."

The restriction upon the power of a state to tax an agency of the federal government is not greater and no less than the restriction upon the power of the United States to tax an agency of the State (Vezie Bank v. Fenno, 8 Wall., 533; Collector vs. Day, 11 Wall., 113; United States v. Baltimore & Ohio R. Co., 17 Wall., 322; Abrosini v. United States, 187 U. S. 1). In South Carolina v. United States, 199 U. S. 437, the court reviewed the previous decisions holding state agencies immune to federal taxation and from them deduced the rule that the immunity extends only to those agencies of a strictly governmental character as distinguished from those doing business of a private character.

It must be conceded that the interests of the United States in the lands covered by plaintiff's leases are mineral in character; that oil

is a mineral and that an oil well is a mine. (Burke v. Southern Pacific Ry. Co., 234 U. S. 659.) But mining is not a public utility. It is a private industry and the exploitation and development of mines are no more governmental functions than the cultivation of the soil or the manufacture of farm machinery. In the control and disposition of its public mineral lands the United States acts in its proprietary capacity and not in virtue of any attribute of sovereignty. As paramount proprietor it has the same right of control and disposition as is incident to absolute ownership in an individual (1 Lindley on Mines, (3d Ed.), Sec. 80), and the fact that in this instance the government reserves as a part of its rent in kind does not affect its relationship to the lessee. (United States v. Gratiot, 14 Peters 526.) In our judgment plaintiff's character is that of a private contractor dealing with the United States upon no different footing than a contractor who undertakes the work of constructing necessary improvements upon a reclamation project or a herdsman who grazes his flock upon a forest reservation under government permit.

Again, it appears to us that it was never the intention of the Congress that a lessee under the federal oil and gas leasing law should be permitted to enjoy the immunity claimed by this plaintiff. Section 32 of the Act above provides "that nothing in this Act shall be construed or held to affect the rights of the states or other legal authorities to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines or other rights, property or assets of any lessee of the United States." It is the general rule for the construction of statutes that every word, phrase, clause or sentence employed is to be considered and none shall be held to be meaningless if it is possible to give effect to it. (Stadler v. City of Helena, 46 Mont. 128, 127 Pac. 434.) In the absence of any congressional declaration upon the subject, all of the privately owned property of this plaintiff within the jurisdiction of the state, including the improvements upon the claims, the net proceeds of the mines, and other property or assets whether used in connection with the mining operations or not, is subject to taxation by this state, and excluding the terms just enumerated, we undertake to say that there is not anything else which is or could be the subject of taxation except the privilege of producing oil, and if that privilege is held to be exempt, then the phrase "or other rights" employed in the statute is meaningless. But we are not at liberty to assume that the Congress employed the expression merely for good measure or to conceal an ideal; on the contrary, it is our judgment that the phrase was used advisedly with the other terms employed to indicate that a lease authorized by the statute shall not confer upon the lessee of the government the right to claim any special exemption from taxation which it not accorded to a lessee of a private owner. In Fidelity & Deposit Co. v. Pennsylvania, above, after employing the language which we have quoted, the court said: "If the pertinent [fol. 46] statute discloses the intention of Congress that such corporations contracting under it with the federal government shall not be exempt from state regulation and taxation, they must submit thereto." And after referring to the Act of Congress under which

the company exercised its right to furnish surety bonds the Court concluded: "Neither circumstances nor language of the Act indicate design or necessity to limit application by the several states of a well established system of licensing and taxing bonding companies not incorporated under their own statutes."

When our Constitution declares that the legislative assembly may impose a license tax upon persons and corporations doing business in this state, it means, of course, that the authority may be exercised upon persons or corporations to which the taxing power of the state extends. It was said in McCulloch v. Maryland, above, that the sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission, and that "all subjects over which the sovereign power of a state extends are objects of taxation." Plaintiff is a domestic corporation owing its very existence and right to transact business to the grace of this State expressed through our general incorporation laws and though its charter is a contract, it was sought and accepted upon the express condition declared by our state Constitution that the laws authorizing it "shall be subject to future repeal or alteration by the legislative assembly." (Sec. 2, Art. XV.) If, instead of enacting the occupation tax statute, our legislature had repealed the statute under which plaintiff exists, its powers to explore for or produce petroleum in this state would have been destroyed absolutely and plaintiff could not have been heard to complain. Section 6013, Revised Codes of 1921, in force in this state since July 1, 1895, provides: "The legislative assembly may, at any time, amend or repeal this part or any chapter or section thereof and dissolve all corporations created thereunder." That the power to destroy plaintiff as a corporate entity was reserved and may be exercised by this state is beyond controversy. (Allen v. Ajax Mining Co., 30 Mont. 490, 77 Pac. 47; Somerville v. St. Ouis M. &. M. Co., 46 Mont. 268, 127 Pac. 464.) It would seem to be but a mere truism to say that the major power to destroy plaintiff's capacity to conduct business must, of necessity, include the minor power to exact an excise as a condition to its right to continue business.

It is our conclusion that plaintiff is not such an agency or instrumentality of the general government as that it may claim immunity from state regulation or control; that it is not exempt from payment of the occupation tax prescribed by Chapter 266 above, and that the complaint does not state facts sufficient to entitle it to relief.

The judgment is reversed and the cause is remanded to the district court with directions to sustain the defendants' demurrer.

Wm. L. Holloway, Associate Justice.

We concur: George W. Farr, Albert J. Galen, Associate Justices. Jeremiah J. Lynch, District Judge, sitting in place of the Chief Justice, disqualified.

Mr. Justice Cooper, being absent, did not hear the argument and takes no part in the foregoing decision.

[fol. 47] SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR REHEARING—Filed November 9, 1923

Comes now the appellant in the above entitled cause and respectfully petitions the Court to grant a re-hearing and to permit a re-argument of the appeal in this cause upon the ground that a question decisve of the case submittted by counsel was overlooked by the Court in its decision of said cause, and appellant here submits its grounds, points and authorities in support of this petition, to-wit:

That the judgment and decision of this Court is contrary to and is [fol. 48] against the law in that it permits indirectly the imposition and levy of a direct tax upon the gross output of a mine and is therefore, in contravention of the Constitution of the State of Montana, and of the laws of the State of Montana, which provide that mining property shall be taxed only upon the net proceeds derived from the sale of the extracted mineral;

The foregoing proposition was pointed out in oral argument, but nowhere in its opinion does the Court consider or in any manner refer thereto; The Court finds that the law in question is clearly a revenue measure and not a license imposed for regulatory purposes; In effect it is held that the law imposes a tax, although such tax is denominated a license tax, but, however denominated, it is in effect and in its actual operation a direct tax upon the gross output of mining properties and on an ad valorem basis; It is the law of this state that mining property can be taxed only upon its net proceeds and yet in sustaining the legislation under consideration this Court permits that to be done indirectly which cannot be done directly; The fact that it may be said that the tax in question is a tax upon the right to do business is begging the question, because regardless of what the tax may be called it will of necessity be what it is, namely, a direct tax upon the gross output of a mine; We wish to again call the attention of the Court to the case of State ex rel Sam Toi vs. French, 17 Montana, 54, and to the two California cases therein cited, to-wit;

City of Santa Barbara vs. Stearns, 51 Calif., 499,
People vs. Martin, 60 Calif., 153,

In addition to these cases we respectfully refer the Court to the deci- [fol. 49] sion of the Supreme Court of the United States in the following cases:

Gulf & Ship Island Ry. Co. vs. Hewes, 46 L. ed. 86,
Wilmington & Waldon Ry. Co. vs. Reid, 20 L. ed. 568.

In conclusion we respectfully request that the proposition here submitted be given the attention of the Court to the end that a rehearing

and reargument be granted and the question advanted herein be ultimately considered in the opinion of the Court in this cause.

Respectfully submitted, Donald Campbell, Attorney for Appellant.

[File endorsement omitted.]

[fol. 50] TWENTY-SIXTH DAY OF OCTOBER TERM, 1923

[Title omitted]

ORDER DENYING REHEARING

Minutes of Supreme Court

Motion for rehearing in this cause is denied.

(Signed) Lew. L. Callaway, Chief Justice. Attest: (Signed) Dana M. Easton, Clerk.

[fol. 51] IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed November 22, 1923

To the Honorable Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana:

Now comes Mid-Northern Oil Co., the Plaintiff and Appellant in the above cause, and represents that on the 31st day of October, 1923, a final Judgment was duly entered by the Supreme Court of the State of Montana, that being the highest court of said State in which a decision could be had on the said suit between Mid-Northern Oil Co., a corporation and J. W. Walker, as Treasurer of the State of Montana, Joseph M. Dixon, Governor of the State of Montana, C. T. Stewart, Secretary of State of the State of Montana, J. W. Walker, Treasurer of the State of Montana, George P. Porter, Auditor of the [fol. 52] State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, as the State Board of Equalization of the State of Montana, affirming the Judgment theretofore entered by the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, wherein manifest error has occurred greatly to its damage, whereby Petitioner fells aggrieved;

That in the record and proceedings it will appear that there was drawn in question the validity of a statute of or an authority ex-

ercised under said State of Montana, on the ground of repugnancy of the Constitution, laws or treaties of the United States, and the decision was in favor of the validity of the law of the said State of Montana;

That this is an action instituted by the Plaintiff for the purpose of obtaining a permanent Injunction against the above named defendants, enjoining them from levying or collecting from this plaintiff, under the provisions of House Bill No. 115 of the Seventeenth Session of the Legislative Assembly of the State of Montana, now Chapter 186 of the Revised Codes of the State of Montana of 1921, a license tax upon its business of producing crude petroleum from lands situated within the State of Montana, it being alleged by the Plaintiff that its operations were confined solely to and its crude petroleum production was had solely from certain lands belonging to the United States of America, held by it under certain leases from the United States of America, and in being further alleged in said Complaint that in the operation of said leases and in [fol. 53] the production of said oil Plaintiff was, and was acting as, a Federal agency or instrumentality and as such was not subject or liable to the imposition of any occupation or license tax; that because the law of the State of Montana, hereinabove referred to, purported to impose a license tax or occupation tax upon this Plaintiff, acting as such government agency or instrumentality, said law was and is unconstitutional and void as being in contravention of Section One of the Fourteenth Amendment to the Constitution of the United States, all of which is fully apparent in the record and proceedings of the case and specifically set forth in the Assignment of Errors filed herewith.

Wherefore, Petitioner prays that a Writ of Error from the Supreme Court of the United States may issue in this case to the Supreme Court of the State of Montana for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Montana, may be sent to the Supreme Court of the United States, as provided by law.

Dated this 22nd day of November, 1923.

C. S. Thomas, Washington, D. C.; Frederick D. Anderson, Denver, Colo.; Donald Campbell, Forsyth, Mont., Attorneys for Mid-Northern Oil Co., Petitioner and Plaintiff in Error.

[fol. 54] The Writ of Error as prayed for in the foregoing Petition is hereby allowed this 22nd day of November, 1923, the Writ of Error to operate as a supersedeas and to preserve the Injunction heretofore issued, and the bond for that purpose is fixed at the sum of $50,000.00.

Dated at Helena, Montana, this 22nd day of November, 1923.

Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[File endorsement omitted.]

[fol. 55] IN THE SUPREME COURT OF THE STATE OF MONTANA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 22, 1923

And now comes Mid-Northern Oil Co., Petitioner and Plaintiff in Error, by C. S. Thomas, Frederick D. Anderson and Donald Campbell, its attorneys, and in connection with its Petition for Writ of Error shows that in the record and proceedings and in the rendering of Judgment and decision of the Supreme Court of the State of Montana in the above entitled cause manifest error has intervened to the prejudice of this Petitioner and Plaintiff in Error, in this, to-wit:

First. The Court erred in holding that House Bill No. 115 of the Seventeenth Legislative Assembly of the State of Montana, be-
[fol. 56] ing Chapter 266 of the Session Laws of the State of Montana of 1921, and now being Chapter 186 (Sections 2397–2408) of the Revised Codes of the State of Montana of 1921, entitled "An Act requiring every person, firm, co-partnership, association, joint-stock company, syndicate and corporation engaged in or carrying on the business of producing within this State petroleum or other mineral or crude oil, or engaged in or carrying on the business of owning, controlling, managing, leasing or operating within this State any well or wells from which petroleum or other mineral or crude oil is produced, to pay to the State Treasurer for engaging in and carrying on such business, certain license fees for the exclusive use and benefit of the State of Montana; Fixing the amount of such license fees; prescribing a method for the assessment and collection thereof; and prescribing penalties for violations of the provisions of this Act," was constitutional and did not violate the Fourteenth Amendment to the Constitution of the United States and did not operate to deprive the Plaintiff in Error, and certain other citizens of the United States and of the State of Montana, of rights, privileges and immunities secured to other citizens of the United States and of said State, and did not operate to deprive the Plaintiff in Error of the equal protection of the law:

[fol. 57] Second. The Court erred in holding that Plaintiff in Error in the operation under Government Lease of the oil lands referred to in the record herein, was not a Government agency or instrumentality and therefore immune from the imposition of an occupation, license or privilege tax:

Third. The Court erred in holding that Section Thirty-five of the Act of Congress of February 25, 1920 (Public 146) gave to the State of Montana, and the other States of the Union, the right to impose a license, occupation or privilege tax upon persons, firms and corporations engaged in the production of crude petroleum upon Government lands, under leases issued under and pursuant to the Act of Congress above referred to:

Fourth. The Court erred in sustaining the Judgment of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and in sustaining the action of said Court in sustaining the Defendant's Demurrer to Plaintiff's Complaint.

By reason whereof this Petitioner and Plaintiff in Error prays that said judgment of the Supreme Court of the State of Montana may be reversed.

[fol. 58] Dated this 22nd day of November, A. D. 1923.

C. S. Thomas, Washington, D. C.; Frederick D. Anderson, Denver, Colorado; Donald Campbell, Forsyth, Montana, Attorneys for Mid-Northern Oil Co., Plaintiff in Error.

[File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed November 22, 1923

On reading the Petition of Mid-Northern Oil Co. for Writ of Error and the Assignment of Errors, and upon due consideration of the record of said cause,

It is ordered, That a Writ of Error be allowed from the Supreme Court of the United States to the Supreme Court of the State of Montana, as prayed for in said Petition, and that said Writ of Error and Citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that said Petitioner and Plaintiff in Error, Mid-Northern Oil Co., [fol. 60] give security in the sum of $50,000.00 that the said Plaintiff in Error shall prosecute said Writ of Error to effect, and, if said Plaintiff in Error fail to make its plea good shall answer to the Defendants in Error for all costs and damages that may be adjudged or decreed on account of said Writ and of the Injunction heretofore issued in this cause;

And the said Plaintiff in Error now presenting a Bond in the sum of $50,000 with Fidelity & Deposit Company of Maryland as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 22nd day of November, 1923.

Llewellyn L. Callaway, Chief Justice of the Supreme Court of the State of Montana.

[File endorsement omitted.]

[fols. 61 & 62] BOND ON WRIT OF ERROR FOR $50,000—Approved and Filed November 22, 1923

[fol. 63] WRIT OF ERROR—Filed November 22, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the Judgment, a plea which is in said Court before you, or some of you, between Mid-Northern Oil Co., a corporation, as Plaintiff and Appellant, and J. W. Walker, as Treasurer of the State of Montana, Joseph M. Dixon, Governor of the State of Montana, C. T. Stewart, Secretary of State of the State of Montana, J. W. Walker, Treasurer of the State of Montana, George P. Porter, Auditor of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, as the State Board of Equalization of the State of Montana, as Defendants and Respondents, your Court being the highest Court of said state having jurisdiction to render Judgment in the case, there was drawn in question the validity of a statute or an authority exercised under said state on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity, and there being manifest error in said decision, greatly to the damage of Mid-Northern Oil Co., a corporation, the Petitioner in Error, and we being willing that if there is error it should be duly corrected, we do therefore command you, if Judgment be therein given, that under the seal of your Court you send the record and proceedings had in said cause to the Supreme Court of the United States, together with this Writ, within Sixty days from the date thereof, that the records and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States the 22nd day of November, in the Year of our [fol. 64] Lord One Thousand Nine Hundred Twenty-three.

C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, by H. H. Walker, Deputy. (Seal of the United States District Court, District of Montana.)

Allowed by Llewellyn L. Callaway, Chief Justice of the State of Montana. (Seal of the Supreme Court, State of Montana.)

[fol. 64½] [File endorsement omitted.]

[fol. 65] CITATION—In usual form, showing service on Rankin and Augstman; filed November 22, 1923; omitted in printing

[fol. 65½] [File endorsement omitted.]

[fol. 66] IN THE SUPREME COURT OF MONTANA

PRÆCIPE AND STIPULATION FOR TRANSCRIPT

To the Clerk of the Supreme Court of the State of Montana:

You are hereby requested to forthwith prepare and certify to the Supreme Court of the United States of America under your hand and the seal of the Supreme Court of the State of Montana a full and complete copy of the proceedings had and orders entered in cause No. 5321, wherein the Mid-Northern Oil Co., a corporation, was plaintiff, and J. W. Walker, as Treasurer of the State of Montana, Joseph M. Dixon, Governor of the State of Montana, C. T. Stewart, Secretary of the State of the State of Montana, J. W. Walker, Treasurer of the State of Montana, George P. Porter, Auditor of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, as the State Board of Equalization of the State of Montana, were defendants, as the same appear of record and on file in your office; the record so prepared to contain the following:

The Transcript on Appeal which contains the following:

Plaintiff's Complaint.
Order to Show Cause and Temporary Restraining Order.
Defendant's Demurrer.
Defendant's Motion to Dissolve Restraining Order.
Order of the Court Sustaining Demurrer and Dissolving Restraining Order.
Judgment of the District Court for Lewis & Clark County, Montana.
Plaintiff's Notice of Appeal.
Plaintiff's Præcipe for Transcript on Appeal.
Certificate to Transcript by Clerk of the District Court for Lewis & Clark County.
[fol. 67] Decision of the Supreme Court of the State of Montana filed in cause No. 5321.
Decision of the Supreme Court of the State of Montana filed in cause No. 5079.
Petition for re-hearing in cause No. 5321.
Order Denying Petition for Re-hearing in Cause No. 5321.
Petition for Writ of Error.
Order Allowing Writ of Error.
Assignment of Errors.
Bond on Writ of Error.

And you are further requested to include within such record the original Writ of Error and Citation issued herein.

Dated this 3rd day of January, 1924.

C. S. Thomas, Frederick D. Anderson, Donald Campbell, Attorneys for Mid-Northern Oil Co., Plaintiff in Error.

It is hereby stipulated and agreed by and between the undersigned, as attorneys for the plaintiff in error and the defendants in error, respectively, that the documents designated in the foregoing Præcipe shall each and all be included in and shall constitute the full and complete transcript of the proceedings and records in cause No. 5321 on the docket of the Supreme Court of the State of Montana, and in which cause writ of error has been allowed to the Supreme Court of the United States of America.

Dated this 4th day of January, 1924.

C. S. Thomas, Frederick D. Anderson, Donald Campbell, Attorneys for Plaintiff in Error. Wellington D. Rankin, Attorney General, by A. H. Augstman, Assistant Attorney General, Attorney for Defendants in Error.

[fol. 68] IN THE SUPREME COURT OF MONTANA

CLERK'S CERTIFICATE

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning same, including the original citation therein.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Montana, at my office in the City of Helena, this 4th day of January, 1924.

Dana M. Easton, Clerk of the Supreme Court of the State of Montana. (Seal of the Supreme Court, State of Montana.)

Endorsed on cover: File No. 30,050. Montana Supreme Court. Term No. 740. Mid-Northern Oil Co., plaintiff in error, vs. J. W. Walker, as Treasurer of the State of Montana; Joseph M. Dixon, Governor of the State of Montana; C. T. Stewart, Secretary of State of the State of Montana, et al., etc. Filed January 12, 1924. File No. 30,050.

IN THE SUPREME COURT OF THE UNITED STATES

MID-NORTHERN OIL CO., a Corporation, Plaintiff in Error,

vs.

J. W. WALKER, as Treasurer of the State of Montana; JOSEPH M. Dixon, Governor of the State of Montana; C. T. Stewart, Secretary of State of the State of Montana; J. W. Walker, Treasurer of the State of Montana; George P. Porter, Auditor of the State of Montana, and Wellington D. Rankin, Attorney General of the State of Montana, as the State Board of Equalization of the State of Montana, Defendants in Error.

STIPULATION

It is hereby stipulated and agreed, by and between the attorneys for the above named parties, respectively, that the remittitur of the Supreme Court of the State of Montana, issued by the clerk and under the seal of said Court, may be included within and may be considered a part of the record in this cause heretofore certified to this court by the Clerk of the Supreme Court of the State of Montana.

Dated this twenty-second day of January, 1924.

C. S. Thomas, Frederick D. Anderson, Donald Campbell, Attorneys for Plaintiff in Error. C. E. Rew and Wellington D. Rankin, by A. H. Angstman, Asst. Atty. Gen., Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE STATE OF MONTANA, OCTOBER TERM, A. D. 1923

(Affirmed)

The Chief Justice of the Supreme Court of the State of Montana to the Honorable Judge of the District Court of the First Judicial District in and for the County of Lewis & Clark, Greeting:

Whereas, in the said District Court in a cause between Mid-Northern Oil Company, a Corporation, plaintiff and appellant, and J. W. Walker, State Treasurer, et al., defendants and respondents, wherein the judgment of the said District Court, entered in said cause on the 16th day of February, A. D. 1923, was in favor of the said defendants and respondents and against the said plaintiff and appellant, as by the inspection of the transcript of record of said Court in said cause which was brought into the Supreme Court of said State by virtue of an appeal, agreeably to the Statute of said State and the rules of said Supreme Court in such case made and provided, fully and at large appears.

And whereas, in the October term of court in the year of our Lord, one thousand nine hundred and twenty-three said cause came on to be heard before said Supreme Court and was argued by counsel.

Whereupon, on consideration, it is now here ordered and adjudged by this Court that the judgment of the Court below, entered in this cause on the 16th day of February, A. D. 1923, be and the same is affirmed at the cost of appellant.

Costs in this Court:

Appellant, Appearance	$10.00
Respondent, Appearance	.....
Remittitur	1.80

Said judgment to be carried into execution according to the terms thereof.

October 31st, A. D. 1923.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause as, according to right and justice, and the laws of the State of Montana ought to be had, said appeal notwithstanding.

Witness: The Honorable Lew. L. Callaway, Chief Justice of the Supreme Court of the State of Montana, this 20th day of November, A. D. 1923.

Dana M. Easton, Clerk of the Supreme Court of the State of Montana.

A true copy. Test: Dana M. Easton, Clerk of the Supreme Court, State of Montana. (Seal of Supreme Court, State of Montana.)

[Endorsed:] File No. 30050. Supreme Court U. S., October Term, 1923. Term No. 740. Mid-Northern Oil Company, P. E., vs. J. W. Walker, as Treasurer, etc. Stipulation and addition to record. Filed Feb. 1, 1924.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 256

MID-NORTHERN OIL COMPANY,

PLAINTIFF IN ERROR,

vs.

J. W. WALKER AS TREASURER OF THE STATE OF MONTANA; JOSEPH M. DIXON, GOVERNOR OF THE STATE OF MONTANA; C. T. STEWART, SECRETARY OF STATE OF THE STATE OF MONTANA, ET AL., ETC.,

DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case comes before this Court upon a writ of error to the Supreme Court of the State of Montana. The facts are undisputed and only certain questions of law are presented by the record. The plaintiff in error is a Montana corporation engaged in the business of prospecting for and producing petroleum. The defendants in error constitute the State Board of Equalization of the State of Montana.

By the constitution of the State of Montana it is provided that the annual net proceeds of all mines and mining claims shall be taxed as provided by law, and because of this constitutional provision, the taxation of mines and their output in Montana has been and is limited to their net proceeds.

The Legislative Assembly of Montana in 1921 passed and adopted what is known as the Oil Producers' License Tax Law, under the terms of which every person, firm or corporation engaged in the production of crude petroleum must pay a license fee or tax to the State of Montana for the privilege of engaging in and carrying on such business. The amount of the license fee is fixed at an amount equal to the value of one per cent of the total gross production of the licensee during each year. While this levy is declared to be a license fee it is not and was not imposed for regulatory purposes but solely for the purpose of providing the State with additional revenues.

Prior to the passage of this Oil Producers' License Tax Law, the plaintiff in error had acquired by various assignments, all of which assignments had been duly and regularly approved by the Secretary of the Interior, interests in three oil and gas leases issued to permittees under and in accordance with the terms and provisions of the Act of Congress of February 25, 1920, otherwise known as the Leasing Law, and at the time of the passage of said Oil Producers' License Tax Law, plaintiff in error was and ever since has been engaged in the development and operation of said leases or portions thereof, and was and is producing crude petroleum from the lands covered by said leases; and that prior to the commencement of this action in the Courts of Montana, plaintiff had not at any time produced oil or crude petroleum of any kind whatsoever, or in any amount whatsoever, from any lands whatsoever within the State of Montana save and except from the lands and premises operated by it under the Government leases above referred to. (Tr. p. 7, par. XXI.)

Subsequent to the passage of said Oil Producers' License Tax Law, the defendants in error as the State Board of Equalization of Montana attempted to exact and collect from plaintiff in error a license fee or tax, under the terms and provisions of said law, equal to the value of one per cent of all crude petroleum produced by plaintiff in error from the lands included in said Government leases. Thereupon plaintiff in error instituted an action in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark against the defendants in error,

for the purpose of permanently enjoining the defendants in error as the State Board of Equalization of Montana from collecting or attempting to collect such license tax, upon the ground that in the development and operation of the leases above referred to plaintiff was acting in the capacity of a federal agency or instrumentality and as such was not subject to any license, occupation or privilege tax. A temporary restraining order was issued and the defendants in error appeared in the Court below by demurrer and motion to quash and vacate such temporary restraining order. This demurrer and motion were, by the Court overruled, and, the defendants in error declining to plead further, judgment was entered in favor of plaintiffs in error, under the terms of which defendants in error were permanently restrained and enjoined from collecting or attempting to collect the license tax above referred to. From this judgment the defendants in error appealed to the Supreme Court of the State of Montana and on such appeal the judgment of the lower Court was reversed with directions to sustain the demurrer interposed by the defendants in error. (Tr. pages 25 to 31.) Acting in accordance with the command of the Supreme Court of the State of Montana, the District Court entered an order sustaining such demurrer, whereupon plaintiff in error declined to plead further and judgment was entered decreeing that plaintiff in error take nothing by its action and that defendants in error have and recover their costs incurred. From this judgment plaintiff in error appealed to the Supreme Court of the State of Montana and upon such appeal the judgment was affirmed by per curiam decision filed October 31, 1923, which decision by its terms adopted the opinion rendered on the former appeal with the exception of the concluding paragraph thereof, which gave directions to the Court below. (Tr. p. 25.) This case is now before this Court for the review of the final decision and opinion of the Supreme Court of Montana, and the operation of such judgment has been stayed by proper bond, and plaintiff in error's original restraining order preserved.

ASSIGNMENT OF ERRORS.

First. The Court erred in holding that House Bill No. 115 of the Seventeenth Legislative Assembly of the State of Montana, being (fol. 56) Chapter 266 of the Session Laws of the State of Montana of 1921, and now being Chapter 186 (Sections 2397-2408) of the Revised Codes of the State of Montana of 1921, entitled "An Act requiring every person, firm, co-partnership, association, joint-stock company, syndicate and corporation engaged in or carrying on the business of producing within this State petroleum or other mineral or crude oil, or engaged in or carrying on the business of owning, controlling, managing, leasing or operating within this State any well or wells from which petroleum or other mineral or crude oil is produced, to pay to the State Treasurer for engaging in and carrying on such business, certain license fees for the exclusive use and benefit of the State of Montana; Fixing the amount of such license fees; prescribing a method for the assessment and collection thereof; and prescribing penalties for violations of the provisions of this Act," was constitutional and did not violate the Fourteenth Amendment to the Constitution of the United States and did not operate to deprive the Plaintiff in Error, and certain other citizens of the United States and of the State of Montana, of rights, privileges and immunities secured to other citizens of the United States and of said State, and did not operate to deprive the Plaintiff in Error of the equal protection of the law:

(Fol. 57.) Second. The Court erred in holding that Plaintiff in Error in the operation under Government Lease of the oil lands referred to in the record herein, was not a Government Agency or instrumentality and therefore immune from the imposition of an occupation, license or privilege tax:

Third. The Court erred in holding that Section Thirty-two of the Act of Congress of February 25, 1920 (Public 146), gave to the State of Montana, and the other States of the Union, the right to impose a license, occupation or privilege tax upon persons, firms and corporations engaged in the production of crude petroleum upon Government lands, under leases issued under and pursuant to the Act of Congress above referred to:

Fourth. The Court erred in sustaining the Judgment of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and in sustaining the action of said Court in sustaining the Defendant's Demurrer to Plaintiff's Complaint.

BRIEF OF THE ARGUMENT.

Plaintiff in Error desires to argue this case from the standpoint of the main question involved, the interference of the State of Montana with the Plaintiff in Error as a Governmental agency, means or instrumentality. Our principal contentions may be briefly stated as follows:

PLAINTIFF IN ERROR, AS OIL AND GAS LESSEE OF THE UNITED STATES, IS A GOVERNMENTAL AGENCY, MEANS OR INSTRUMENTALITY WHOSE OPERATIONS CANNOT BE TAXED BY THE STATE.

THIS STATUS OF PLAINTIFF IN ERROR ARISES FROM THE TRUST RELATIONSHIP EXISTING BETWEEN THE UNITED STATES AND THE PEOPLE THEREOF IN RELATION TO THE PUBLIC LANDS. THE CASE IS CONTROLLED BY DECISIONS OF THIS COURT CULMINATING IN GILLESPIE VS. OKLAHOMA, 257 U. S. 501. SAID STATUS LIKEWISE ARISES BECAUSE THE LEASING OF OIL AND GAS LANDS IS A DISPOSAL THEREOF UNDER THE CONSTITUTION, AND THEREFORE THE EXERCISE OF A GOVERNMENTAL POWER.

THE LEASING LAW DOES NOT WAIVE THIS EXEMPTION FROM STATE TAXATION. THE PURPOSE AND EFFECT OF SECTION 32 OF THE ACT IS TO REMOVE UNCERTAINTY BY CONFIRMING EXISTING RIGHTS OF THE STATES. GRANT OF POWER TO THE STATES TO TAX THE OPERATIONS OF THE LESSEE WOULD BE ENTIRELY INCONSISTENT WITH THE OBJECTS AND PURPOSES OF THE ACT. SUCH A GRANT OR SURRENDER OF SOVEREIGNTY MUST BE MADE IF MADE AT ALL IN EXPRESS AND UNEQUIVOCAL TERMS. IT CAN NEITHER BE PRESUMED NOR RESULT FROM FORCED CONSTRUCTION.

The peculiar importance of this case is at once apparent when it is considered that the United States by the Act of February 25, 1920 (The Oil Leasing Act), has adopted a new and radically different policy of disposing of certain public lands of a mineral character. The act provides a system of leasing to private individuals, associations, corporations and municipalities. These agencies, upon whom are conferred certain rights and obligations, operate oil and gas lands under the payment and rendering of both rental and royalty.

This new policy of disposal is not more important and far-reaching in its consequences, however, than the peculiar nature of the mineral content of the lands with which we are now concerned. Oil and gas have a fugitive character and once the deposit is reached by the drill, the contents of the surrounding lands are in material measure drawn away. As this Court has said in *Ohio Oil Co. v. Indiana,* 177 U. S. 190, 202; 44 L. Ed. 729, 737; 20 Sup. Ct. Rep. 576, 581:

> "They (oil and gas) have no fixed situs under the particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission."

The United States, therefore, cannot stand idly by while an individual owner operates upon adjacent lands as it might were solid minerals involved. It must find a responsible and efficient lessee, under the terms of the act, who may bring the government oil to the surface along with the oil allotted to the lessee as payment for his operations, and thus prevent it from being drained away by others. Thus, independently of the high desirability of the successful and efficient performance of all governmental functions on the part of the United States, in this case it becomes peculiarly necessary that the Government shall not be handicapped in disposing of its oil and gas lands by any interference arising from the taxing power of the States.

There are two aspects or principal divisions to the argument of plaintiff in error. The first concerns the prime consideration of whether or not plaintiff in error is a governmental agency, means or instrumentality. Having established this and having shown that plaintiff in error *as* such agency,

means or instrumentality, cannot constitutionally be burdened in its operations by a State license tax, it will be necessary to meet the claim that the very statute of the United States setting up the oil and gas lessee as an agency, means or instrumentality, confers a right upon the State of Montana to lay a license tax upon the operations of such lessee.

I.

PLAINTIFF IN ERROR IS A GOVERNMENTAL AGENCY, MEANS OR INSTRUMENTALITY AND EXEMPT FROM THE TAX SOUGHT TO BE IMPOSED.

Briefly stated, plaintiff in error's position on the first point is as follows: That the law in question constitutes a license measure in the nature of an occupation or privilege tax, and cannot, upon any theory, be construed as a direct property tax; that no license tax, occupation, or privilege tax can lawfully be imposed upon a governmental agency, means or instrumentality; that in operating the oil leases in question the plaintiff in error is a governmental agency, means or instrumentality, and therefore is immune from the imposition of this license tax, and the law authorizing the same is unconstitutional and void.

At the outset it will be conceded as found by the Supreme Court of Montana (Tr. p. 26) that the tax in question (Ch. 266 Montana Laws 1921, Secs. 2397-2408, Revised Codes Montana, 1921) can be classed only as a license or occupation tax The pertinent portion of the law is as follows (Sec. 2397):

> "Every person engaging in or carrying on the business of producing * * * petroleum * * * must * * * pay to the State Treasurer, for the exclusive use and benefit of the State of Montana, license tax for engaging in and carrying on such business in an amount equal to one percentum of the total gross value of all petroleum * * * produced by such person within this State during such year * * *."

The act in all its incidents and characteristics is a revenue measure and a license tax. By its terms it demands the pay-

ment to the State Treasurer of a given sum of money as a prerequisite to the right to carry on a designated line of business; it provides that the license fee charged shall be in addition to all other taxes and other fees now required to be paid by the persons subject to the provisions of the act (Sec. 2408 R. C. M. 1921). The fees collected shall be deposited to the credit of the General Fund of the State of Montana; (Sec. 2406 R. C. M. 1921) and a violation of the provisions of the act subjects the offender to fine and imprisonment. (Sec. 2407 R. C. M. 1921.) See *Choctaw, Oklahoma and Gulf Railroad Co. v. Harrison,* 235 U. S. 292, 299; 59 L. Ed. 234, 237; 35 Sup. Ct. Rep. 27, 29, for a similar act held to lay an occupation tax, where the Court says:

> "The manifest purpose is to reach all sales and secure a certain percentage thereof—a method commonly pursued in respect of license and occupation taxes."

But if the terms and language of the act are not sufficient in themselves to clearly establish it as a license measure and should the Court be disposed to view and treat the law as one imposing a direct tax upon property upon an ad valorem basis the unconstitutionality of such law as a direct property tax measure becomes at once apparent, as Sec. 3 of Art. XII of the Constitution of Montana provides that the annual net proceeds of all mines and mining claims shall be taxed as provided by law, and under this provision and the laws enacted in pursuance thereof no gross proceeds tax can be levied upon the output of mining property. The law in question, viewed as a direct property tax, would constitute a direct tax upon an ad valorem basis upon the gross proceeds of a mine, for that oil is a mineral and that an oil well is a mine in contemplation of law, is not open to question.

> 18 *R. C. L.,* p. 1205.
> *Burke v. Southern P. R. Co.,* 234 U. S. 669; 58 L. Ed. 1527; 34 Sup. Ct. Rep. 907.

The language of Chapter 164 of the Revised Codes of Montana of 1921, which deals with the taxation of mines, and

provides for the taxation of their net proceeds, by express terms treats petroleum as the product of a mine. (Sec. 2089 R. C. Mont. 1921.)

Assuming then that the law is what it purports to be, a measure imposing a license, occupation, or privilege tax, it will be our endeavor in the remaining portions of this Brief to point out and establish its unconstitutionality, at least as applied to this plaintiff in error.

1. *No license, occupation, or privilege tax can lawfully be imposed by a State upon a governmental agency, means or instrumentality.*

We deem it unnecessary and improper to cite any considerable portion of the decisions of this Court establishing this principle. The first authority is, of course,

> *McCullough v. Maryland,* 4 Wheat. 316; 4 L. Ed. 579.

This has been followed by an unbroken line of decisions, the purport of which is well expressed by the case of

> *Union Pacific Railroad Co. v. Peniston,* 18 Wall. 5, 34; 21 L. Ed. 787, 792,

as follows:

> "As was said in Weston v. Charleston, 2 Pet. 466, they (the states) cannot, by taxation or otherwise, 'retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' "

And by

> *Pollock v. Farmers Loan and Trust Co.,* 157 U. S. 429, 584; 39 L. Ed. 759, 820; 15 Sup. Ct. Rep. 673, 690,

where it is stated:

> "As the States cannot attack the powers, the operations, or the property of the United States, nor the means which they employ to carry their

> powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State."

In a recent case a postal employee who delivered mail by government truck was held not subject to a law of the State of Maryland requiring an examination as to fitness and the imposition of a vehicle license tax.

> *Johnson v. Maryland,* 254 U. S. 51; 65 L. Ed. 126; 41 Sup. Ct. Rep. 16.

The ground of these decisions is the supremacy of the Federal Constitution and the laws made in pursuance thereof and the entire independence of the general government from any control by the respective States.

> *Farmers' and Mechanics' Savings Bank of Minneapolis v. Minnesota,* 232 U. S. 516, 521; 58 L. Ed. 706, 709; 34 Sup. Ct. Rep. 354, 356.

2. *The plaintiff in error, acting as a lessee of oil and gas lands from the United States; is a governmental agency, means or instrumentality.*

By the terms of the government leases (Tr. p. 11 et seq.), under which the plaintiff in error solely operates, a rental of One Dollar per acre is reserved to the United States for each and every acre of land embraced within the lease. A share of the oil or the profits derived from the sale of the oil extracted from the leased premises is taken by the United States, which share ranges from five to thirty-three and one-third per cent, depending upon the initial status and claim of the lessee, as such status and the rights of the lessee are fixed and defined by the terms of such law and the regulations of the Department of the Interior made pursuant thereto. In his operations under such lease the lessee is amenable to no person, power or sovereignty other than the United States of America. All of his operations are subject to the direct supervision and control of the United States Bureau of Mines; he is required to give bond to the United States conditioned for the faithful

compliance with all of the terms of his lease; his lease is not subject to surrender and voluntary termination by him except with the approval and consent of the Secretary of the Interior; he mines and operates the ground, sharing the fruits of his labors in specified proportion with the government; he is, in fact, the person selected and chosen by the government as its instrumentality for the purpose of developing and operating properties and mineral resources of the government; he is the arm of the government selected for this purpose, fortified and strengthened by all the powers of sovereignty.

It would seem that the Supreme Court of the United States has finally and effectually disposed of the question as to whether a lessee under this character of lease is or is not a Federal agency or instrumentality, and has answered the question in the affirmative by its decisions in a line of cases originating in the State of Oklahoma. We will first review these cases briefly and then notice the attempt made in the opinion of the Supreme Court of the State of Montana (Tr. p. 28, 30) to distinguish them from the case now before the Court.

An examination of the Oklahoma cases will disclose the fact that Chapter 186 of the Revised Codes of Montana of 1921 was apparently, to a very great extent, modeled upon the Gross Production Tax Law of Oklahoma, as that law at one time existed. A persistent but unsuccessful effort has been made by Oklahoma to subject oil leases on Indian lands or the production therefrom, or the income arising from such production to some form of State taxation. The Oklahoma Legislature of 1907-08 passed a law entitled "An Act for the Levying and Collection of a Gross Revenue Tax, Etc.," (Act of May 26, 1908) which, with certain amendments, became Sections 7459-7469 of the Revised Laws of Oklahoma of 1910. This law required all persons engaged in the mining or production of certain mineral, including petroleum, to file within thirty days after the expiration of each quarter annual period, with the State Auditor, a statement under oath, showing the location of each well operated during the preceding quarter, the kind and amount of oil produced therefrom, and the actual cash value thereof, and to pay to the State Treasurer, a gross revenue tax, which should be *in addition* to the tax levied and

collected on an ad valorem basis upon such oil property and the appurtenances thereto, and equal to two per cent "of the gross receipts from the total production." In 1909 the legislature amended the law reducing the tax to one-half of one per cent. This whole law relative to gross revenue taxes was re-enacted by the Legislature, and is contained in the Oklahoma Session Laws of 1910, together with an amendment thereto adding a proviso to the effect that the person or persons liable for the tax, in making the required return shall set out the amount of royalty required to be paid for the benefit of the Indian Citizen, Indian Tribe, or landlord, and that in computing the tax such person or persons shall pay the actual cash value of the entire gross production, less the royalty paid by such person or persons. This law, so amended, and with this proviso, was construed by the Supreme Court of the State in the case of *McAllester-Edwards Coal Co. v. Trapp*, 43 Okla. 510, 522; 141 Pac. 794, 799 (rehearing denied June 30, 1914); and the Court there held that the law imposed a valid tax upon property, and was not a burden upon any instrumentality of the Federal Government. This case was taken to the United States Supreme Court and on October 12, 1915, was

> "Reversed at the costs of the plaintiffs in error, and cause remanded for further proceedings per stipulation of counsel." 239 U. S. 651, 652; 60 L. Ed. 486, 486; 36 Sup. Ct. Rep. 159, 159.

The pertinent portion of this stipulation is as follows:

> "It is agreed by the plaintiffs in error and the defendants in error that this action involves the same statement of facts and principles of law involved in *Choctaw, Oklahoma & Gulf Railway Co. vs. Harrison*, 235 U. S. 292; 59 L. Ed. 27 (No. 45), in which cause the judgment and opinion of the Supreme Court of the United States was rendered November 30, 1914, contrary to the contention of the defendants in error herein; the plaintiffs in error herein being engaged in the business

of mining coal from segregated coal lands of the Choctaw and Chickasaw Indians in the State of Oklahoma, under leases from said Tribes made and approved by the Department of the Interior of the United States, and the taxes herein sought to be enjoined being those created by the several Acts of the Legislature of the State of Oklahoma declared invalid in the said judgment and opinion rendered November 30, 1914, by the Supreme Court of the United States in said cause of *Choctaw, Oklahoma & Gulf Railway Company v. John A. Harrison.*

"It is therefore by the parties hereto further stipulated and agreed that the judgment herein declaring the validity of the said taxes shall be reversed."

The case of *Choctaw, Oklahoma and Gulf R. R. Co. v. Harrison,* 235 U. S. 292; 59 L. Ed. 234; 35 Sup. Ct. Rep. 27, upon which said stipulation for reversal in the McAllester-Edwards case supra is based, came to this Court on appeal from the District Court of the United States for the Eastern District of Oklahoma. The same revenue act was involved as in the McAllester-Edwards case and the lessee in each case had coal leases on lands belonging to the Chickasaw and Choctaw nations pursuant to the Act of Congress approved June 28, 1898 (Stat. 495, Sec. 13 Ch. 517), commonly known as the Curtis Act confirming the Atoka Agreement, which provided that mines on said lands should be under the supervision and control of two trustees appointed by the President, should be subject to rules prescribed by the Secretary of the Interior, and that royalties should be paid into the Treasury of the United States with power of the Secretary of the Interior to change the rate of royalty and provide for fixed sums as advance royalties. This case was decided by the Supreme Court November 30, 1914, and reversed the order of the United States District Court sustaining a demurrer to the original bill and in effect, reversing the holding of the Court below in the McAllester-Edwards case. The Court said:

"From the foregoing it seems manifest that

> the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state. * * *
>
> "We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment—provision is made for determining that upon a different basis." (235 U. S. 292, 298.)

The Supreme Court, in the above case, cites *Missouri, K. & T. R. Co. v. Meyer,* 204 Fed. 140, in the United States District Court for the Western District of Oklahoma, involving the same statutes and the decision of which is to the same effect. We quote the following language from the decision of the District Court:

> "If the tax be sustained, it seems clear it might be extended by legislation to the limit of depriving the leases of all value and of frustrating the exercise of the Federal power." (204 Fed. 140, 145.)

The law was again amended in 1915 to lay a two per cent tax on "the gross value of the production" and as amended appeared in the Session Laws of Oklahoma for 1915, at pages 18-183, and as amended was construed by the Supreme Court of the State of Oklahoma in the case of *Wolverine Oil Co.,* 53 Okla. 24, 154 Pac. 362; L. R. A. 1916 F, 141, where the law was declared to be one imposing an occupation tax, but inasmuch as the law as amended exempted all Federal agencies and instrumentalities from the operation thereof it was held to be constitutional and enforceable as against persons or corporations whose operations were not such as to make them Federal agencies or instrumentalities. A petition for re-hearing was filed in the Wolverine case, and within thirty days

after its denial the law was again amended, and appeared as Chapter 39 of the Session Laws of Oklahoma of 1916.

The Act of 1916, decisions upon which we will now notice, laid a three per cent tax on "the gross value of the production," less the royalty interest. The royalty interest was also subjected to the tax except royalty interest of the State and when royalty interests "are exempt from taxation under the laws of the United States." The Act of 1916 also provided that the tax was in lieu of property taxes and that the State Board of Equalization should equalize the tax when greater than the general ad valorem tax.

As so amended the constitutionality of the law was passed upon by the Supreme Court of Oklahoma in the case of *Large Oil Co. v. Howard,* 63 Okla. 143, 163 Pac. 537, and its constitutionality upheld, but the State Supreme Court then declared that the law imposed a direct tax upon property and was not to be at all construed as imposing a license tax. The State Court makes a strong effort to distinguish between the Oklahoma Act of 1916 then before the Court and the Oklahoma Act of 1907 held invalid in *Choctaw Oklahoma G. & R. Co. v. Harrison, supra,* on the ground that the 1916 Act was strictly a property tax in lieu of the regular property tax, and that the State had power to conform the rate to the equivalent of the property tax. The leases involved were all tribal lands of the Osage nation of Indians, leased under the Act of February 28, 1891. When the case came to the Supreme Court of the United States, however, this Court in a memorandum decision *(Large Oil Co. v. Howard,* 248 U. S. 549; 63 L. Ed. 416, 39 Sup. Ct. Rep. 183) reversed the judgment "upon the authority of" the following cases:

Choctaw, Oklahoma and Gulf Railroad Co. v. Harrison, 235 U. S. 292; 59 L. Ed. 234; 35 Sup. Ct. Rep. 27.

Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 530; 60 L. Ed. 779, 783; 36 Sup. Ct. Rep. 453, 456.

The Court also refers without comment to

Howard v. Gypsy Oil Co., 247 U. S. 503; 62 L. Ed. 1239; 38 Sup. Ct. Rep. 426.

The Choctaw case we have already commented upon. The Indian Territory Illuminating Oil Co. case involved Sec. 7338 R. L. Oklahoma 1910, laying a property tax on public service corporations. The leases there were of lands of the Osage tribe under the Act of Congress of February 28, 1891 (26 Stat. at L. 794, 795, Ch. 383, Comp. Stat. 1913, Sec. 4195). The Court said:

> "A tax upon the leases is a tax upon the power to make them, could be used to destroy the power to make them. If they cannot be taxed as entities they cannot be taxed vicariously by taxing the stock, whose only value is their value, or by taking the stock as an evidence or measure of their value, rather than by directly estimating them as the Board of Equalization and the referee did. * * *.
>
> "It follows from these views that the assessment against the oil company, so far as it included the leases, whether as separate objects of taxation or as represented or valued by the stock of the company, is invalid."

The Howard v. Gypsy Oil Co. case supra, was also a memorandum decision affirming the decree of the United States District Court for the Western District of Oklahoma, "enjoining the collection of gross production taxes upon oil and gas produced from leased Indian lands." The Judgment of the Supreme Court rests "upon the authority of" the Choctaw and Indian Territory Illuminating Oil Co. cases. As pointed out in *Gillespie v. Oklahoma,* 257 U. S. 501; 66 L. Ed. 338; 42 Sup. Ct. Rep. 171, hereinafter commented upon, the Howard case involved the 1916 Act.

Apparently the Oklahoma Legislature was at a loss for further amendments. The Supreme Court of Oklahoma failed to follow the two memorandum decisions of the Supreme Court of the United States relating to the Act of 1916 *(Large Oil Co. v. Howard, supra* and *Howard v. Gypsy Oil Co., supra)* for in the case of *In Re Skelton L. & Z. Co.'s Gross Production Tax for 1919,* 81 Okla. 134, 197 Pac. 495, the Oklahoma Court again sustained the Act of 1916 upon the theory

that it was a tax directly upon property. It also expressly overruled its decision in the Wolverine case in so far as that case held the gross production tax, Chapter 107, Session Laws of 1915, to be not a property tax and not a substitute tax for the general ad valorem tax. The Court also avers that it is impossible to tell what is decided by the memorandum decisions in the Large Oil Co. and Howard v. Gypsy Oil Co. cases, that those cases involved different Oklahoma statutes than the Choctaw case, a fact which the United States Supreme Court apparently overlooked. Note here that in the case of *Gillespie v. Oklahoma,* 257 U. S. 501, 504; 66 L. Ed. 338, 340; 42 Sup. Ct. Rep. 171, 172, it appears that the same contentions were made and rejected by this Court in the following language:

> "In Choctaw, O. & G. R. Co. v. Harrison, supra, it was held that such a lessee could not be taxed on the gross sales of coals from Choctaw and Chickasaw mines, when the tax was in addition to the taxes collected upon an ad valorem basis. In Indian Territory Illuminating Oil Co. v. Oklahoma, supra, it was held that a similar lessee could not be taxed upon the value of an Osage oil lease. Subsequently the principle was applied per curiam to gross production taxes under a later statute of 1916, without reference to the fact that the taxes, instead of being in addition to, were in lieu of, all taxes upon property rights. Howard v. Gypsy Oil Co. 247 U. S. 503, 62 L. Ed. 1239, 38 Sup. Ct. Rep. 426; Large Oil Co. v. Howard, 248 U. S. 549, 63 L. Ed. 416, 39 Sup. Ct. Rep. 183.
>
> "* * * If the cases that we have mentioned as decided per curiam tend to oppose the state's position, on the ground that, if the property is exempt, the income from it also is exempt, it is urged that, so far as appears, the distinction between the Statute of 1916, then before the court, and the statutes dealt with by the authorities cited in those cases, was overlooked.
>
> "We cannot assume that there was the over-

> sight supposed. The decision in 240 U. S. 522, that such leases were not taxable, went on general principles, not on the nature of the particular statute, and in Shaffer v. Carter, 252 U. S. 37, 48, 64 L. Ed. 445, 454, 40 Sup. Ct. Rep. 221, a case that adverted to the distinction relied upon, pp. 57, 58, the decisions per curiam were referred to as decided upon the merits. Those decisions appear to us to have been correct."

After the decision in the Skelton case the Gross Production Tax Law of Oklahoma again came before the Court and the whole question was reconsidered and reviewed in the case involving the *Protest of Bendelari Gross Production Tax of 1919*, 82 Okla. 97; 198 Pac. 606, and that decision, following the decision in the Skelton case, treated the Oklahoma law as imposing a property tax assessed upon an ad valorem basis and, while recognizing that no occupation tax or license may be levied or imposed upon a governmental agency or instrumentality, held that the property of such agent situated within the State may be made the subject of a direct tax. The Skelton case was re-affirmed by the Supreme Court of Oklahoma in the case of *Bergin O. & G. Co. v. Howard*, 82 Okla. 176; 199 Pac. 209.

Meanwhile, the taxing authorities of Oklahoma made another attempt to lay a tax of some sort on the lessee of Indian lands. Chapter 164, Oklahoma Laws of 1915, set up an income tax on income from all sources. The State attempted to hold one Gillespie liable for such tax for 1915, 1916, 1917 and 1918 on net income derived as lessee of certain restricted Indian Creek and Osage lands. The State Court upheld the tax on the ground that it did not interfere with an admitted governmental instrumentality. The Supreme Court of the United States, in its opinion, *Gillespie v. Oklahoma* (January 30, 1922), 257 U. S. 501, 505, 66 L. Ed. 338, 340; 42 Sup. Ct. Rep. 171, 172, referred to the per curiam decisions as above indicated and states, as follows:

> " 'A tax upon the leases is a tax upon the power to make them, and could be used to destroy

the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long.

"* * * Whether this property could be taxed in any form or not, it cannot be reached as profits or income from leases such as those before us. The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and, stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards."

From the foregoing it appears that this Court has uniformly held that lessees of Indian Lands are governmental agencies, means or instrumentalities on account of the trust relationship involved and has disapproved every tax devised by the State of Oklahoma in the way of a tax on Indian lease production. The latest holding of the Court in the Gillespie case, supra, taken with its previous holdings above cited, governs the case now before the Court and determines that the plaintiff in error is a governmental agency, means or instrumentality and therefore the Montana occupation or license tax is unconstitutional and void.

The State of Montana contended below and will doubtless here contend, and the Supreme Court of Montana in its opinion (Tr. p. 28-30) stated that these cases arising in Oklahoma were so decided because of the peculiar character of the lease involved. We quote the language of the Court as found on p. 28 of the transcript:

"In other words, the court did not (fol. 44) hold that every individual or corporation having a lease upon public land is ipso facto an agent or instrumentality through which the government executes its powers to dispose of the public lands, but it did hold that the fiduciary relationship existing between the United States and the particular Indian wards imposed upon the government

> a positive duty to lease the Indian lands and to secure for the Indians the most advantageous terms available; that in the discharge of its duty the government approved the leases in question and chose the lessee in each instance as its agent or instrumentality through which it carried its leases into execution and thereby discharged its public duty."

This we believe to be a narrow and unwarranted distinction, contrary to the decisions of this Court and the principle involved as we shall show under the following subdivision of this brief.

3. *The disposal of the public lands by government oil and gas lease is the performance of a trust by the United States such as cannot be controlled by the States.*

We recognize that the Oklahoma cases were decided upon what we shall call the *trustee* theory, the nature of which is clearly stated in the cases and has already been commented upon in this brief. It would be surprising indeed if we should find that this theory which protects the rights of the Indians in respect of land, the title to which is in the United States for the benefit of the Indians, would not also apply to all lands owned by the United States and which are held in trust for all the people.

This trust relationship of the United States was referred to by Mr. Madison in the *Federalist* in the following words:

> "The Federal and State Governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."

This is quoted in the case of *Lane Co. v. Oregon*, 7 Wall. 71, 76; 19 L. Ed. 101, 104, and the Court has elsewhere frequently referred to this relationship.

> " '*All the public lands of the nation are held in trust for the people of the whole country,*' United States v. Trinidad Coal and Coking Co., 137 U. S. 160; 34 L. Ed. 640; 11 Sup. Ct. Rep. 57.

> And it is not for the courts to say how that trust shall be administered. This is for Congress to determine."
>
> *Light v. United States,* 220 U. S. 523, 537; 55 L. Ed. 570, 574; 31 Sup. Ct. Rep. 485, 488.

The language of the opinion in *United States v. Gratiot,* 14 Peters 526, 532; 10 L. Ed. 573, 576, in referring to leasing of mineral lands, speaks of the exercise of the power to dispose of the public lands, as the exercise of a delegated trust.

In *Camfield v. United States,* 167 U. S. 518, 524; 42 L. Ed. 260, 262; 17 Sup. Ct. Rep. 864, 866, a case involving the removal and abatement of a fence enclosing public lands, the Court says:

> "It (the United States) would be recreant to its duties as *trustee for the people* of the United States to permit any individual or private corporation to monopolize them for private gain and thereby practically drive intending settlers from the market."

There are two different aspects of this duty owed by Congress pursuant to this trust relationship in respect to public lands; one is the high public duty and the interest of the whole country involved in developing the material resources of the United States. This is carefully pointed out in the two following cases from which we quote, in both of which the United States sought to set aside patents. The first case involves mineral and the second agricultural land:

> "It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. *They were held in trust for all the people;* and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, *in the discharge of a high public duty* and in the interest of the whole country, sought to develop the material resources of the United

States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value."

United States v. Trinidad Coal and Coking Co., 137 U. S. 160, 170; 34 L. Ed. 640, 644; 11 Sup. Ct. Rep. 57, 61.

"*These lands are held in trust for all the people*, and in providing for their disposal Congress has sought to *advance the interests of the whole country* by opening them to entry in comparatively small tracts under restrictions designed to accomplish their settlement, development, and utilization."

Causey v. United States, 240 U. S. 399, 402; 60 L. Ed. 711, 713; 36 Sup. Ct. Rep. 365, 367.

The second aspect of said trust relationship is the disposal of public lands to acquire moneys which, together with the proceeds of taxation, shall be devoted to the payment of debts and to provide for the public defense and the general welfare. By the Leasing Act, the Government for the present at least, has abandoned its former method and policy with respect to the disposal of certain classes of mineral lands and has now determined that they shall be disposed of by a system of leasing to private individuals, associations, corporations and municipalities. This is undoubtedly "advancing the interests of the whole country" and "discharging a high public duty" no less than the former system and policy. The rule as now applicable, is clearly stated in a decision of the Circuit Court of Appeals for the Eighth Circuit rendered in 1915 in the case of the *United States v. Utah Power and Light Co.*, 230 Fed. 328, 336. This case involved an injunction against maintaining power works on the public domain, and we quote the following language of the Court:

"The public lands of the United States are held by it, not as an ordinary individual proprietor, *but in trust for all the people of all the*

states to pay debts and provide for the common defense and general welfare under the express terms of the Constitution itself. It matters not whether the title is acquired by cession from other states, or by treaty with a foreign country, whether the lands are located within states or in territories, they are held for these supreme public uses when and as they may arise. *The Congress has the exclusive right to control and dispose of them, and no state can interfere with this right or embarrass its exercise.* United States v. Gratiot, 14 Peters, 526, 10 L. Ed. 573; Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; Irvine v. Marshall, 20 How. 558, 15 L. Ed. 994; Gibson v. Chouteau, 13 Wall. 92-99, 20 L. Ed. 534."

In *Van Brocklin v. Anderson,* 117 U. S. 151, 158, 29 L. Ed. 845, 847, 6 Sup. Ct. Rep. 670, 674, the holding was that lands situated in a State and acquired by the United States, through sales for direct taxes levied by Congress, are not subject to state taxation. The Court says:

"The United States do not and cannot hold property, as a monarch may, for private or personal purposes. *All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defense and general welfare of the United States.'* Constitution, art. 1, sec. 8, cl. 1; Dobbins v. Erie County Comrs. 16 Pet. 435, 448 (41 U. S. bk. 10, L. Ed. 1022, 1027). The principal reason assigned in Buchanan v. Alexander, 4 How. 20 (45 U. S. bk. 11, L. Ed. 857) for holding that money in the hands of a purser, due to seamen in the navy for wages, could not be attached by their creditors in a state court was: 'The funds of the government are specifically appropriated to certain national objects; and if such appropriations may be diverted and defeated by state process or otherwise, the functions of the government may be suspended.'"

That the Leasing Act applies the property and revenues of the United States as all taxes are laid and collected, to pay the debts and provide for the common defense and general welfare of the United States, is apparent when it is considered that the United States reserves by the Leasing Act a rental of One Dollar per acre per year and a share of the oil or proceeds thereof, ranging from five to thirty-three and one-third per cent. This income is held and disposed of pursuant to Sec. 35 of the Act, which is as follows:

> "That 10 per centum of all money received from sales, bonuses, royalties, and rentals under the provisions of this act, excepting those from Alaska, shall be paid into the Treasury of the United States and credited to *miscellaneous receipts;* for past production 70 per centum, and for future production 52½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid into, reserved, and appropriated as a part of the reclamation fund created by the act of Congress, known as the reclamation act, approved June 17, 1902, and for past production 20 per centum, and for future production 37½ per centum of the amounts derived from such bonuses, royalties, and rentals shall be paid by the Secretary of the Treasury after the expiration of each fiscal year to the State within the boundaries of which the leased lands or deposits are or were located, said moneys to be used by such State or subdivisions thereof for the construction and maintenance of public roads or for the support of public schools or other public educational institutions, as the legislature of the State may direct; *Provided,* That all moneys which may accrue to the United States under the provisions of this act from lands within the naval petroleum reserves shall be deposited in the Treasury as 'Miscellaneous receipts.' "

Section 35 of the Leasing Act therefore distributes the

royalty to the beneficiaries of the trust, namely the people of the United States; directly as to ten per cent, which goes into miscellanoeus receipts of the Treasury of the United States; and, indirectly as to fifty-two and one-half per cent paid to the reclamation fund; and also as to thirty-seven and one-half per cent paid to the States, to be used for public roads and school purposes.

That the method of distribution is immaterial, is clear by comparing the statutes in the Oklahoma cases with the leasing act. In *Choctaw Oklahoma and Gulf Railroad Co. v. Harrison, supra,* the act of June 28, 1898, authorizing the lease, provided "the revenues derived therefrom should be used for the education of their children" but that the royalties should be paid into the Treasury of the United States. In *Indian Territory Illuminating Oil Co. v. Oklahoma, supra,* the royalty was payable under the act of 1891 to the Indian Agency, under and by virtue of rules and regulations laid down by the Department of the Interior. Therefore, by one channel or another and by devotion to one purpose or another the royalties were applied for the benefit of the beneficiaries of the trust. So in leasing public oil and gas lands of the United States, Section 35, *supra,* distributes the royalties directly and indirectly to or for the benefit of the people of the United States, the beneficiaries of a trust of great significance and wide extent.

That Congress did not regard the manner or method of distribution as affecting the principles involved or the effect or operation of the act is to be inferred from the grouping in one paragraph, consisting of a single sentence, of provisions for disposition of receipts from naval petroleum reserves (all of which are deposited in the Treasury as "Miscellaneous receipts") and for disposition of receipts from public lands subject to lease under the act.

IF, THEREFORE, THE GOVERNMENT OWES A DUTY TO ITS INDIAN *CESTUI QUE TRUSTENT,* WHICH CANNOT BE MINIMIZED OR AFFECTED BY A STATE TAXING LAW, IT FOLLOWS THAT A SIMILAR DUTY EXISTS WITH REGARD TO GOVERNMENT LEASES OF SIMILAR LANDS YIELDING SIMILAR PRODUCTS AND REQUIRING SPECIFIC DISTRIBU-

TION OF PROCEEDS DIRECTLY AND INDIRECTLY TO THE PEOPLE OF THE UNITED STATES, THE BENEFICIARIES OF THE TRUST.

4. *The disposal of the public lands is the exercise of a governmental power such as cannot be interfered with by the States.*

The question of the existence of an Indian lease under a specific Act is not of paramount importance, however, in the light of *Hallowell v. United States,* 221 U. S. 317, 324; 55 L. Ed. 750, 753; 31 Sup. Ct. Rep. 587, 589. On certificate to this Court, the question was presented of whether an Indian who is a citizen of the United States may be convicted under the laws of the United States for introducing intoxicating liquor into his allotment or is subject to the law of the State. The conviction in the United States Court was affirmed, the Court saying:

> "In the case at bar, the United States had not parted with the title to the lands, but still held them in trust for the Indians. In that situation its power to make rules and regulations respecting such territory was ample. Van Brocklin v. Anderson (Van Brocklin v. Tennessee) 117 U. S. 151, 167, 21 L. Ed. 845, 850, 6 Sup. Ct. Rep. 670; Gibson v. Chouteau, 13 Wall. 92, 99, 20 L. Ed. 534, 536; Light v. United States, 220 U. S. 523, ante, 570, 31 Sup. Ct. Rep. 485."

So here the lands are held in trust by the United States under an act giving the Secretary of the Interior power to make rules and regulations and with this statute and the rules and regulations pursuant thereto, the State has no power to interfere.

Leaving the trustee theory, which alone we submit is a sufficient answer to the contention of the State of Montana, we come to a demonstration of the invalidity of this law upon another ground, to wit: that the United States is exercising *one of its governmental or sovereign powers* conferred by the States when it issues leases to plaintiff in error and

such action, therefore, cannot be burdened with a tax upon operations of the lessee. This involves a consideration of the constitutional provision authorizing disposal of the public lands and the meaning of the term "disposal." The constitutional provision empowering Congress to pass the Leasing Act. is Art. IV., Sec. 3, cl. 2, as follows:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

The provision has been construed many times by this Court. Before making citation of authority, it seems proper to notice an argument approved by the Montana Supreme Court which has a direct bearing at this point and which indeed is the major premise of its finding. The Court says: (Tr. p. 29)

> "We think the Supreme Court of the United States has recognized a distinction between an agency or instrumentality through which governmental powers are executed and an agency employed or made use of by the government as a mere incident to the discharge of some of its functions, * * * *
>
> (p. 30) "In the control and disposition of its public mineral lands the United States acts in its proprietary capacity and not in virtue of any attribute of sovereignty."

The Court quotes from *Flint v. Stone Tracy Co.*, 220 U. S. 107; 55 L. Ed. 389; 31 Sup. Ct. Rep. 342, and *South Carolina v. United States*, 199 U. S. 437; 50 L. Ed. 261; 26 Sup. Ct. Rep. 110.

We know of no case where the distinction has been put upon the ground of the United States acting in a proprietary capacity. We may argue that such a distinction could not

obtain in the case of the Federal Government, for the reason that its powers as conferred by the people are actually and even necessarily of a sovereign or governmental character and that power granted by the constitution is bound to have such a nature. However, the power in question is clearly governmental. The cases making the distinction between governmental and proprietary capacity all relate to the States. The South Carolina case, *supra*, refers to a United States tax on the dispensing of liquors by the State, held by a divided Court to be an ordinary private business and not of a strictly governmental character.

In Re Board of Rapid Transit Commissioners, 197 N. Y. 81, 96, 90 N. E. 456, 460, in what appears to be *obiter dictum*, the Court holds the subway to be a business enterprise, belonging to the city as a proprietor and not as a sovereign.

Flint v. Stone Tracy Co., supra, arose over the question whether public service corporations are within the terms of the corporation tax act of 1909. The Court decided in the affirmative upon the ground that it is not part of the essential governmental function of a State to provide means of transportation, supply artificial light, water and the like. The Court then lays down the rule that

> "the true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character." (220 U. S. 107, 172).

It is obvious that the disposal of public mineral lands under an express provision of the constitution can be nothing else than the execution of a governmental function and one which the United States can only do itself.

This function is supreme, as was said of the power over interstate commerce in *Sinnot v. Davenport*, 22 How. 227, 243; 16 L. Ed. 243, 247, as follows:

> "This paramount authority of the act of Congress is not only conferred by the Constitution itself, but is the logical result of the power

over the subject conferred upon that body by the states."

We will now refer to a few decisions defining the power of the United States to dispose of its lands and illustrating our contention that such disposal is the exercise of a governmental power.

Van Brocklin v. Anderson, 117 U. S. 151; 29 L. Ed. 845; 6 Sup. Ct. Rep. 670, is the leading case respecting the power of the United States to dispose of its lands. Here it was sought to enforce by sale, a lien of state taxes against real property struck off to the United States for non-payment of taxes levied by the latter Government. The holding is that such lien cannot be enforced as no tax lies thereon so long as the land is owned by the United States.

Light v. United States, 220 U. S. 523, 537; 55 L. Ed. 570, 574; 31 Sup. Ct. Rep. 485, 488, held that the United States might have injunctive relief where a cattle owner grazed stock on a forest reserve without the required permit. The court distinguished *Van Brocklin v. Anderson, supra*, by saying that it does not lead to the conclusion "that it is without the rights incident to ownership." Nevertheless the Court recognizes that the full power to control the forest reserve is of a public nature.

The nature of the right is aptly expressed in two State cases in *People v. Folsom*, 5 Cal. 379, 383, and *State v. Central Pacific Railroad Co.*, 21 Nev. 247, 255, 30 Pac. 686, 687, as follows:

The prime and uncontrolled right of disposition of the territory of the United States, no less than the right of eminent domain, and the fee itself, is an *attribute of sovereignty*.

People v. Folsom, Supra.

The United States is both a proprietor and a *sovereign* with respect to public lands.

State v. Central Pacific Railroad Co., Supra.

That this power is exclusive, is also definitely established by the following cases:

Butte City Water Co. v. Baker, 196 U. S. 119; 49 L. Ed. 409; 25 Sup. Ct. Rep. 211.

Utah Power and Light Co. v. United States, 243 U. S. 389, 404; 61 L. Ed. 791, 816; 37 Sup. Ct. Rep. 387, 389.

Gibson v. Chouteau, 13 Wall. 92, 99; 20 L. Ed. 534, 536.

The last case cited above is unequivocal on the proposition that the power to dispose of the public domain is subject to no limitations. We quote as follows:

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. *No state legislature can interfere with this right or embarass its exercise;* and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."

The provision in the Montana Compact disclaiming all right to interfere with the public lands and their disposal is as follows:

> "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall

> be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States * * * *."

Montana Enabling Act, Sec. 4, Sub. 2.

In *People v. Commissioners of New York City and County*, 2 Black 620, 634; 17 L. Ed. 451, 455; the state law taxed a state bank upon its capital stock according to its value. The Court held this to be a property tax and invalid as to government obligations, saying that the power to borrow money on the credit of the United States "is one of the most important and even vital functions of the General Government; and it is exercising a means of supplying the necessary resources to meet exigencies in times of peace or war." We submit that there are two other ways of supplying the sinews of peace and war; namely, the taxing power and the disposal of public property.

We pause long enough to note that there is nothing contrary to the foregoing in decisions affirming power of the United States to deal with its property as a private individual. Thus in *Camfield v. United States*, 167 U. S. 518, 524; 42 L. Ed. 260, 262; 17 Sup. Ct. Rep. 864, 866, in passing on removal and abatement of a fence enclosing the public lands, the Court says that the United States has the right of an ordinary proprietor to "deal with such lands precisely as a private individual may deal with his farming property," including the right to sell or withhold from sale. To the same effect *United States v. Midwest Oil Company*, 236 U. S. 459, 474; 59 L. Ed. 673, 681; 35 Sup. Ct. Rep. 309, 313, where it is stated that Congress not only has a legislative power over the public domain but also exercises the power of a proprietor therein. Again the Montana Supreme Court (Tr. p. 30) says:

> "In the control and disposition of its public mineral lands the United States acts in its proprietary capacity and not in virtue of any attribute of sovereignty. As paramount proprietor it has the same right of control and disposition as is incident to absolute ownership in

> an individual (1 Lindley on Mines, (3d Ed.), Sec. 80)."

The distinction involved is unmistakable. The regalian doctrine of ownership in the Crown Metals has never prevailed in the United States (Lindley on Mines, 3d. Ed., Vol. 1, Sec. 80, p. 123). The United States acquires mineral land by cession or purchase in the same manner as a private individual might purchase and hold lands. The United States then has all the authority, rights and powers of any other proprietor over its lands. But neither Lindley nor any other authority does or can hold that the disposal of the public lands under the express constitutional provision is *not* the exercise of a governmental function or power. Congress disposes of the public lands for public purposes, thereby exercising a public or governmental function.

Having established that the right to dispose of the public lands is a governmental power, it remains to be considered whether or not the leasing act provides for a disposal of public lands pursuant to the constitutional provision. We regard this question as set at rest by *United States v. Gratiot,* 14 Pet. 526, 10 L. Ed. 573. There a written agreement provided that Gratiot should have for one year the use of lands upon which lead mines were situated for cultivation and fuel so far as needed; that he should have the right to purchase the ore as it was taken by another from the mines and the use of the ore for smelting, that he should pay a certain rent, and that the United States should have a right of re-entry under certain contingencies. This was held to be a lease and authorized by Article IV, Section 3 of the Constitution.

The Court then proceeds as follows and we submit that its remarks control the case at bar (14 Pet. 526, 537):

> "That the mines now in question lie within the territory referred to in the act of Congress, and are the property of the United States is not denied. And the Constitution of the United States (article four, section three) provides, 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property, belong-

ing to the United States.' The term 'territory,' as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.' And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest. In the case of M'Culloch v. The State of Maryland, 4 Wheat. 422, the Chief Justice, in giving the opinion of the court, speaking of this article, and the powers of Congress growing out of it, applies it to territorial governments; and says, all admit their constitutionality. And again, in the case of The American Insurance Company v. Canter, 1 Peters, 542, in speaking of the cession of Florida under the treaty with Spain, he says that Florida, until she shall become a State, continues to be a territory of the United States government, by that clause in the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of Congress over the lands belonging to the United States, *the words 'dispose of,' cannot receive the construction contended for at the bar—that they vest in Congress the power only to sell, and not to lease such lands.* The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon State rights, by the creation of a numerous tenantry within their borders, as has been so strenuously urged in the argument. The law of 1807, authorizing the leasing of the lead mines, was passed before Illinois was organized as a state; and she cannot now complain of any disposition or regulation of the lead mines previously made by Congress. She surely cannot claim a right to the public lands within her limits.

It has been the policy of the government, at all times, in disposing of the public lands, to reserve the mines for the use of the United States. *And their real value cannot be ascertained without causing them to be explored and worked, under proper regulations.* The authority given to the President to lease the lead mines is limited to a term not exceeding five years; this limitation, however, is not to be construed as a prohibition to renew the leases from time to time, if he shall think proper so to do. The authority is limited to a short period, so as not to interfere with the power of Congress to make other disposition of the mines, should they think proper so to do. Does, then, the contract upon which the present action is founded, fall within the authority given to the President to lease the lead mines? Or, in other words, is this contract a lease within the meaning of the law. In construing this contract, the bond, and what is called 'the license for smelting,' are to be taken as parts of the same instrument; and purport to have been made by the defendants, with T. C. Legate, superintending the United States lead mines, acting under the direction of the Secretary of War, who must be presumed to be acting under the authority of the President; especially as the permission given by the contract in terms, is said to be by and with the approbation of the President of the United States. This contract purports to be a license for smelting lead ore, and it is objected that this is not a lease within the meaning of the act of Congress. But this objection is not well founded. It is a contract for one year, and, of course, within the time limited by the law, which gives to the President authority to lease for five years. Is it, then, a lease? The legal understanding of a lease for years is a contract for the possession and profits of land for a determinate period, with the recompense of rent. The

contract in question is strictly within this definition. The business of smelting is a part of the operation of mining, although it may be a distinct branch from that of digging the ore; but the law ought not to be so construed as to require the whole operation to be embraced in the same contract. They are different operations, requiring different qualifications, and distinct regulations. *This contract is for the possession of land. The work is to be performed at the United States lead mines, and must, of course be performed within the limits prescribed by law to be attached to such mines.* And there is an express permission to use as much fuel as is necessary to carry on the smelting business, and to cultivate as much land as will suffice to furnish teams, etc., with provender; and there is an express reservation of the rent of six pounds of every hundred pounds of lead smelted, with special and particular stipulation for securing the same. It is not necessary that the rent should be in money. If received in kind, it is rent, in contemplation of law.

"We are accordingly of opinion that the question certified in the record must be answered in the affirmative."

It is significant that Sec. 1 of the Act of February 25, 1920, provides that certain minerals, including oil, "shall be subject to *disposition* in the form and manner provided by this act."

We will not extend this brief by setting forth the authorities on the question of what passes by an oil and gas lease to illustrate the nature of the government lease as a disposal, but will content ourselves, in view of the strong holding of the Gratiot case, *supra,* with an excellent resume of the authorities contained in an address of Mr. James A. Veasey of Tulsa, Oklahoma. This was delivered at the annual meeting of the State Bar Association of Texas on July 2, 1920, at El Paso. This material is also included in an article

in Vol. 18, No. 6 of the *Michigan Law Review* for April, 1920, as follows:

> "Assuming that the lessor owns the oil and gas within his land in the same sense that he would own solid minerals deposited therein, we come to this critical question: What is the precise nature of the interest or estate vested in the lessee under an oil and gas lease? Broadly speaking, the lessee has the following rights and privileges: *First,* the right to enter upon the premises for the purposes of the lease; *secondly,* the right to explore for oil and gas thereon which, in itself, contemplates an assault upon the integrity of the lessor's estate; *third,* the right to possess such portion of the surface as may be necessary in the development and operation of the land; and *finally, the right to appropriate as personal property the oil and gas produced by him.* When the grant is so analyzed it must appear that the ultimate and underlying right thus created is the one last mentioned, namely, *the right to take the oil and gas.* All antecedent rights and privileges are mere incidents of this primary underlying right. Otherwise stated, the antecedent privileges are easements appurtenant to the only right which gives character to the instrument, namely, *the right to take the oil and gas.* Having thus reduced the problem to its simplest terms, this question arises; What is the essential nature of an instrument whereby A, the absolute owner of the oil and gas within his land, grants to B the right to take such oil and gas? The point admits of but one answer: If the oil and gas are a component part of A's land in the same sense that the soil is a part thereof, then B acquires a profit in the land of A, or more precisely defined, a *profit a' prendre.* Blackstone says: 'Common of turbary is a liberty of taking turf from another's ground. *There is also a common of digging for coals, min-*

erals, stones, and the like. All these bear a resemblance to common of pasture in many respects, although in one point they go much farther; common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary and those *aftermentioned* are a right of carrying away the *very soil itself.'* Blackstone II, 32. Such was the conclusion of the Supreme Court of Pennsylvania in the first reported case on the question. (*Funk v. Haldeman,* 53 Pa. St. 229.) It is worthy of comment that no court since then has treated the subject with such learning, although other cases correctly term the lessee's estate a *profit a' prendre.* (*Phillips v. Springfield Crude Oil Co.,* (Kan.) 92 Pac. 1119; *Koen v. Bartlett,* (W. Va.) 23 S. E. 666; *Rich v. Doneghey,* (Okla) 177 Pac. 86; *Campbell v. Smith,* (Ind.) 101 N. E. 89."

Mr. Veasey goes on to point out that *Ohio Oil Company v. Indiana,* 177 U. S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, holding that the owner of the fee in Indiana has no title to the oil until actually reduced to possession is not inconsistent with the existence of a *profit a' prendre.* Continuing from the same address:

"There are just two grounds which support the conclusion that an oil and gas lease creates a profit; *first,* that the lessor has the absolute ownership of the oil and gas in place within his land. If this is conceded, the lessee's estate is a profit because it is analogous to a common of digging minerals, stones, and the like, which are constituents of the land. On the other hand, if the lessor's right to the oil and gas in place is qualified in the sense determined by the Supreme Court of the United States in the Ohio case, then the lessee's interest or estate is a profit because it is analogous to a grant of the right to hunt or fish on the land of another. * * *

"To this point our attention has been centered upon the following related propositions: *first,* that the lessor has the absolute right of property to the oil and gas within his land; *second,* that an oil and gas lease takes its essential character from the underlying purpose and design of the parties thereto; *third,* that in *every* case the primary object of the parties is to vest the lessee with a single and specific right, namely, *the right to take the oil and gas from the lessor's land; fourth,* that the right to explore and the other privileges incidental to the enjoyment of the ultimate right are but easements appurtenant to the primary right; *fifth,* that this specific underlying right is of the nature of a profit in the lessor's land, and therefore an incorporeal interest only, it is none the less an estate in land. *Post v. Pearsall,* 22 Wend. 425; *Goodrich v. Burbank,* (Mass.) 12 Allen 459; *Grubb v. Guilford,* (Pa.) 4 Watts 223; *Johnston v. Cambria Iron Co.,* 32 Pa. St. 241; *Boatman v. Lassley,* 23 Ohio St. 614; *Pierce v. Keator,* 70 N. Y. 419; *Black v. Elkhorn Mining Co.,* 49 Fed. 549; *Heller v. Daley,* (Ind.) 53 N. E. 490. Finally then, if a grant of this character creates a profit, *then this specific estate vests upon the execution and delivery of the lease, and the estate so vested perseveres throughout the life of the grant regardless of whether the property is made productive or not.* Logic will admit of no other conclusion."

Leases under the Act of February 25, 1920, grant the definite right to go on the lands operated and take away a part of the earth itself—a part be it noted that is usually the chief, if not the sole, value of such lands. If they are merely leases, in the narrow sense of the term, the Gratiot case nevertheless constitutes them *disposals* under the Constitution. They are in truth instruments creating an estate in the nature of a *profit a' prendre.*

THEREFORE, IF THE SOMEWHAT PECULIAR CONTRACT OF THE GRATIOT CASE IS A DISPOSAL OF LANDS, AND CONSEQUENTLY THE EXERCISE OF A GOVERNMENTAL POWER, *A FORTIORI* GOVERNMENT LEASES UNDER THE LEASING ACT ARE ALSO A DISPOSAL AND EXERCISE OF A GOVERNMENTAL POWER, WHICH CANNOT BE IMPEDED OR INTERFERED WITH BY STATE TAXATION.

5. *Cases cited in the opinion of the State Court considered.*

It is proper that we notice three cases cited by the Court below, namely:

> *Baltimore Ship Building and Dry Dock Co. v. Baltimore;* 195 U. S. 375, 382; 49 L. Ed. 242, 244; 25 Sup. Ct. Rep. 50, 51.
>
> *Fidelity & Deposit Co. of Maryland v. Pennsylvania;* 240 U. S. 319, 323; 60 L. Ed. 664, 668; 36 Sup. Ct. Rep. 298, 300.
>
> *Choctaw, Oklahoma and Gulf Railroad Co. v. Mackey,* 256 U. S. 531; 65 L. Ed. 1076; 41 Sup. Ct. Rep. 582.

In the Baltimore case, *supra*, the United States conveyed land to the company on condition that it should build a dry dock thereon and accord the United States perpetual right to use the same upon occasion, with a condition subsequent, if the dock remained unfit for use for six months. The state attempted to tax the land. The Supreme Court distinguished the case on the ground that there was

> "No easement or present right *in rem.* * * * It would be a very harsh doctrine indeed that would deny the right of the states to tax lands because of a mere possibility that such lands might lapse to the United States."

Since the corporation made no claim that it was an agency and since the tax was upon the land, the language quoted by the Court below (Tr. p. 28) seems to be by way of dictum. The United States, as this Court points out, had merely a

personal claim against the corporation reinforced by a condition. However, the building and maintaining of the dock seems to us to be a mere contract which under the language of the Fidelity and Deposit Co. case, *supra*, "does not necessarily render the corporations governmental agencies and confer freedom from state control."

In the Fidelity and Deposit Co. case, *supra*, a Maryland corporation, licensed to do business in Pennsylvania, was also authorized by Federal statute to become surety upon bonds, undertakings and reconnaisances of Federal officers in Pennsylvania in litigation pending in that state. The Court pointed out that the act was permissive and did not undertake to endow any corporation with power "but only to permit those complying with specified conditions to exercise their lawful powers derived from other sources." The great difference is obvious between this case and that of a corporation having a lease of government land and bringing to the surface valuable mineral products thereof, thus enabling the United States to discharge its trust to the people of the country and to dispose of its lands pursuant to the Constitution.

Choctaw v. Mackey, supra, relates to a *property* tax on a right of way which had become a part of through lines of a great railroad system which incidentally served, among other territories, leases on Indian lands.

6. *The Montana tax lays such a burden or interference as to render it invalid.*

As we have endeavored to point out in the earlier portions of this brief, no such license or occupation tax as the one in question can lawfully be levied or imposed upon a Federal agency, means or instrumentality and if the plaintiff in error is such, the law imposing the tax is unconstitutional and void, irrespective of the immediate effect of such tax. However even if it be conceded that the test is whether or not the interference will impair the efficiency of the agency, means or instrumentality we affirm that there is such impairment here. It is a fundamental principle that the power to tax gives the power to destroy, and no Court will sit as an arbiter to say when a license tax will or will not be a burden upon the person or corporation against whom it is imposed, or when it will or will not be destructive. This Court in

an early case laid down the proposition that degree of interference was immaterial.

> "If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operations may be impeded and may be destroyed if any interference is permitted."
>
> *United States v. Baltimore and Ohio Railroad Co.*, 17 Wall. 322, 327; 21 L. Ed. 597, 599.

This has been often reiterated and is the law today. See *Johnson v. Maryland*, 254 U. S. 51, 55; 65 L. Ed. 126, 128; 41 Sup. Ct. Rep. 16, 16.

It is with the legality and constitutionality of the law that this Court is concerned, and not the practical effect thereof, but the rule is that an occupation or license tax directed against a governmental agency is presumed to impair its efficiency.

> "It is, therefore, manifest that exemption of Federal Agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. *A tax upon their operations is a direct obstruction to the exercise of Federal Powers.*
>
> *Union Pacific R. R. Co. v. Peniston, supra* (18 Wall. 5, 36.)

Consideration of the degree of interference brings us logically to an examination of that part of the opinion below which states (Tr. p. 31) that the major power of the State of Montana to destroy the capacity to conduct business by

repealing its charter must necessarily include the minor one of laying an occupation tax, as follows:

> "Plaintiff is a domestic corporation owing its very existence and right to transact business to the grace of this State expressed through our general incorporation laws and though its charter is a contract, it was sought and accepted upon the express condition declared by our state Constitution that the laws authorizing it 'shall be subject to future repeal or alteration by the legislative assembly.' (Sec. 2, Art. XV.) If, instead of enacting the occupation tax statute, our legislature had repealed the statute under which plaintiff exists, its powers to explore for or produce petroleum in this state would have been destroyed absolutely and plaintiff could not have been heard to complain. Section 6013, Revised Codes of 1921, in force in this state since July 1, 1895, provides: 'The legislative assembly may, at any time, amend or repeal this part or any chapter or section thereof and dissolve all corporations created thereunder.' That the power to destroy plaintiff as a corporate entity was reserved and may be exercised by this state is beyond controversy. (Allen v. Ajax Mining Co., 30 Mont. 490, 77 Pac. 47; Somerville v. St. Louis M. & M. Co., 46 Mont. 268, 127 Pac. 464.) It would seem to be but a mere truism to say that the major power to destroy plaintiff's capacity to conduct business must, of necessity, include the minor power to exact an excise as a condition to its right to continue business."

The minor power of imposing a tax upon the doing of business does not necessarily follow the major power possessed by the state, of extinguishing the corporate existence. The state cannot annul a corporation's contracts or extinguish its debts or liabilities, merely because it can, at pleasure, by virtue of its fundamental law, cut short the corporate existence. It is well settled by decisions of this Court, that the

dissolution of a corporation, whether voluntary or involuntary, does not confiscate or destroy the property or annul the executory contracts and obligations of the corporation.

Mumma v. The Potomac Company, 8 Pet. 281, 8 L. Ed. 945.

Shields v. Ohio, 95 U. S. 319, 324; 24 L. Ed. 357, 359.

Greenwood v. Union Freight Ry. Co., 105 U. S. 13, 19; 26 L. Ed. 961, 964.

Lake Shore and M. S. R. Co. v. Smith, 173 U. S. 684, 690; 43 L. Ed. 858, 861; 19 Sup. Ct. Rep. 565, 567.

See also:

Cummington Realty Associates v. Whitten, 239 Mass. 313; 132 N. E. 53; 17 A. L. R. 527.

If the State of Montana revoked the charter of the plaintiff in error, the United States could still insist that the obligations of its lease be performed, and would hold the persons upon whom devolved the assets of the company responsible for its performance. The validity of the license tax in question would remain as acute as before. Those persons continuing the performance of the Government lease, whether former directors, creditors or stockholders, or assignees thereof, would continue to act as Federal instrumentalities.

We doubt whether the State could take away its franchise after the corporation had acquired the status of a governmental agency, in the face of the paramount nature of the constitution and laws of the United States. The holding of this Court on the matter we believe foreshadowed in the case of *Central Pacific Railroad Company v. State of California,* 162 U. S. 91, 127; 40 L. Ed. 903, 915; 16 Sup. Ct. Rep. 766, 779. There the railroad company was organized under the State law and received certain franchises and assistance from the United States in aid of the construction of its road. The State of California taxed the franchise of the company as property. The Court held that the State could tax the *state* franchise but said:

> "*If the state franchise should be voluntarily surrendered by the company to the state, or for-*

feited by the state, yet the United States through the Federal franchise could still operate the road in California. And, on the other hand, should plaintiff in error in any manner be deprived of its Federal franchise, it would not be thereby prevented from operating in California under its state franchise. The right and privilege, or franchise, of being a corporation, is of value to its members and is considered as property separate and distinct from the property which the corporation may acquire; but, apart from that, if the state franchise to be assessed were confined to the right to operate the road and take tolls, such a franchise was originally granted by the state to this company, and as such was taxable property. If the subsequent acts of Congress had the effect of creating a Federal franchise to operate the road, *that merely rendered the state right subordinate to the Federal right,* and did not destroy the state right nor merge it into the Federal right, and no authority is cited to sustain any such proposition."

The question is further set at rest by the reasoning of this Court in the following cases:

Owensboro National Bank v. Owensboro, 173 U. S. 664, 683; 43 L. Ed. 850, 858; 19 Sup. Ct. Rep. 537, 543.

Home Savings Bank v. Des Moines, 205 U. S. 503, 519; 51 L. Ed. 901, 910; 27 Sup. Ct. Rep. 571, 576.

In the Owensboro case, a franchise tax as laid on a national bank was declared void. The court examined the contention that the tax was equivalent, in its effect, to the permitted tax on shares in the hands of stockholders and after holding that that would not necessarily be the result, proceeded to say:

"If the mere coincidence of the sum of the taxation is to be allowed to frustrate the pro-

> visions of the act of Congress, then that act becomes meaningless and the power to enforce it in any given case will not exist. This follows since if mere coincidence of amount and not legal power be the test, only a pure question of fact would arise in any given case. The argument that public policy exacts that where there is an equality in amount between an unlawful tax and a lawful one, the unlawful tax should be held valid, does not strike us as worthy of serious consideration."

In the Home Savings Bank case, *supra*, the Court compared the tax on the stockholders' right and the property tax, measured by the value of the shares, saying:

> "But the two kinds of taxes are not equivalent in law, because the state has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the state has not the power to levy this tax, we will not inquire whether another tax, which it might lawfully impose, would have the same ultimate incidence."

We submit therefore that the State Court is mistaken in holding that the power to revoke a corporate charter includes the power to levy a license tax under the circumstance here involved. The question essentially is whether the tax is laid upon an agency or instrumentality of the Federal Government.

II.

THE ACT OF FEBRUARY 25, 1920 (THE LEASING LAW), DOES NOT BY ITS TERMS GRANT TO THE STATE THE POWER TO IMPOSE THE LICENSE TAX IN QUESTION.

1. ***The statute confirms the existing rights of the States. It adds nothing to them.***

Section 32 of the Leasing Law provides as follows:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations, to do any and all things necessary to carry out and accomplish the purpose of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purpose of this Act: PROVIDED, that nothing in this Act shall be construed or held to affect the rights of the States or other local authorities to exercise *any rights which they may have*, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property or assets of any lessee of the United States."

It was contended in the Court below by the defendant in error and its contention sustained that this section of the act confers upon the several states the right to impose the license tax in question. It will be conceded that unless such grant of power is so included it cannot exist.

Upon its face this proviso is limited to rights which the states *may have* and therefore relates to and is confirmatory of existing rights. It is clearly settled by a long line of cases, a few only of which we cite, that there is a clear right in the States (with a limitation hereinafter noted) to tax the property of a governmental agency or instrumentality, which is something quite distinct from taxing the operations of the agent.

> *Thompson v. Union Pacific R. R. Co.*, 9 Wall. 579, 19 L. Ed. 792.
>
> *Union Pacific R. R. Co. v. Peniston*, 18 Wall. 5; 21 L. Ed. 787.

Not only the present tense of the verb *have* is of first importance but the word *may* is highly significant in the phrase *rights which they may have.* Section 1 of the Act of February 25, 1920, provides for disposition to

> "citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United

> States or of any state or territory thereof, and in the case of coal, oil, oil shale, or gas to municipalities."

The rights of the states over such varied persons and entities as citizens, associations, corporations and municipalities, is bound to be of a varied and diverse nature. By *may have* Congress means that those rights are left as they may be—in whatever varied state they already exist.

A blanket phrase of this kind may be used and will be applied where it is possible to apply it without construing it to grant additional rights. That is to say general language is frequently used in the face of well known and established exceptions which persist. In support of this doctrine reference is made to *Sturges v. Crowninshield,* 4 Wheat. 122, 201; 4 L. Ed. 529, 550, where Chief Justice Marshall, in discussing the Federal Bankruptcy Law, refers to the 61st Section which

> "declares that the act shall not be construed to repeal or annul the laws of any state then in force for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview."

The Court says:

> "This section certainly attempts no construction of the constitution, nor does it suppose any provision in the insolvent laws impairing the obligation of contracts. *It leaves them to operate, so far as constitutionally they may,* unaffected by the act of Congress, except where that act may apply to individual cases."

A similar situation arose in *State v. Thos. Cruse Savings Bank,* 21 Mont. 50, 55; 52 Pac. 733, 735. The State laid a license tax on banks. The defendant claimed it was not liable for the tax because national banks paid no tax and the State Constitution, Art. XV, Sec. 11, provided that no foreign corporation should have greater rights or privileges than domestic corporations. The Court held that the Constitution could not have referred to corporations organized by the General

Government for governmental purposes "which the sovereign power of the State had no authority to tax except by special permission of Congress."

It should be noted that the rights confirmed are in general *any rights,* limited immediately to those *which they may have* and followed by a particular example introduced by the word *including. Which they may have* therefore governs the whole proviso clause. We pause to state that it is extremely unlikely that Congress would confer a right upon the States which they did not possess in a subordinate clause introduced by the word *including.* The particular right forming the subject of the example introduced by *including* is the right of taxation defined and limited as the right *to levy and collect taxes.* Then follows the objects that may be taxed: "improvements, output of mines, *or* other rights, property or assets." It is significant that the *or* which we italicize occurs where it does. The phrase, *other rights, property or assets* is thus set off as one group correlative with *improvements* and *assets.* As the *property* of governmental agencies may be taxed, we take it that there will be no dispute that the States already have the right to tax *improvement, output of mines, property* and *assets. Other rights* is in the same clause and sentence and embodied in the same grammatical construction and connection. If there was to be a change of meaning, a conferring upon the States of a power they did not possess, it would be logical to expect a change of expression or construction, and if there is no change we are justified in considering that no such change of meaning was intended.

Lewis Sutherland Stat. Const., Vol. 2, p. 777, Sec. 401.

Neal v. Scruggs, 95 U. S. 704; 24 L. Ed. 586.

To put it another way *other rights* must be of the same class or nature as the words with which it appears. After enumerating *improvement* and *output of mines* and then referring to *other rights,* the clause jumps back to *property* and *assets.* It is extremely unlikely that *other rights* can refer to a subject of tax of any different nature from those which precede and which follow. This we conceive to be well settled by authority and to be the holding of the following cases:

United States v. Salem, 235 U. S. 237, 249; 59 L. Ed. 210, 214; 35 Sup. Ct. Rep. 51, 53.

Virginia v. State of Tennessee, 148 U. S. 503, 519; 37 L. Ed. 537, 543; 13 Sup. Ct. Rep. 728, 734.

United States v. Bevans, 3 Wheat. 336, 390; 4 L. Ed. 404, 417.

Neal v. Scruggs, 95 U. S. 704; 24 L. Ed. 586.

In *United States v. Salem, supra,* eight clauses were contained in the declaration prescribed for an importer to execute. The Court said:

> "Seven of the eight clauses distinctly related to documents. To say that the sixth clause in this enumeration was intended to embrace undefined extraneous matter would be to suddenly depart from the particular to the general, and back again from the general to the particular; from the particular subject of documents, to which the attention of the affiant had been specially directed by the first five clauses, into a general field of wide and indefinite scope; and—in the seventh clause—again to return to the particular subject of documents. Such an interpretation would give an exceedingly liberal construction to a statute defining a felony. It would ignore the fact that the meaning of words is affected by their context, and violate the settled rule that words which, standing alone, might have a wide and comprehensive import, will, when joined with *those defining specific acts, be interpreted in their narrower sense, and understood to refer to things of the same nature as those described in the associated list, enumeration, or class.*"

In *Virginia v. State of Tennessee, supra,* the Court held that the rule "noscitur a sociis" applies to all written instruments, including even the Constitution of the United States.

Hodgson vs. Mountain and Gulf Oil Co. (Dist. Ct. D. Wyo.), 297 Fed. 269, 270, in construing the last clause of Sec-

tion 19 of the leasing act, known as the "inuring clause," holds that the word *otherwise* includes only things of a like or similar kind, and nothing of a higher class than that which it immediately follows.

Therefore, considering the significance of the words and phrases used in the section and their relationship, we submit it clearly appears that the States or other legal authorities are left with rights they now possess and receive nothing additional and are not the recipients of further grants of power.

2. *The right to tax the governmental agency, means or instrumentality is inconsistent with the whole purpose and object of the Leasing Law and is not conferred by it.*

Taxation respects a subject matter over which Congress and the States may exercise a concurrent power but this is subject, on account of the paramount authority of the United States, to a qualification by "the exclusion of the states from the taxation of the means and instrumentalities employed in the exercise of the functions of the Federal Government."

> *Bank tax cases; Van Allen v. Nolan (Van Allen v. the Assessors),* 3 Wall. 573; 18 L. Ed. 229.
>
> *Austin v. Aldermen of Boston,* 7 Wall. 694; 19 L. Ed. 224.
>
> *Van Brocklin v. Anderson,* 117 U. S. 151, 155; 29 L. Ed. 845, 846; 6 Sup. Ct. Rep. 670, 672.

Bearing in mind this well established qualification of the concurrent rights of the States in respect of taxation, we again observe that by the Leasing Act, Congress turns its back on a practice and policy of many years standing and sets up a machinery for the disposal of certain of the public mineral lands through leases involving rental and royalty. It seems to us entirely absurd to say that Congress at the same time and as part of the same scheme should confer upon the States the power to burden, harass or cripple the agencies, means or instrumentalities thus set up. On the other hand it seems entirely consistent and proper for the United States to assure the States that the new scheme should not interfere with the rights of the States where this could be avoided, which is the purport and effect of the proviso clause.

In *United States Trust Co. v. Atlantic and Pacific Railroad Co.*, 8 N. M. 673, 693; 47 Pac. 725, 730, a right of way exempt from taxation, was granted to the railroad through the territories of the United States. The territory of New Mexico attempted to tax this right of way as personal property. The Court said:

> "The land being, in its virgin state, distinctly exempt; the roadbed being the land so converted; and the appurtenances—rails and ties, station buildings, work shops, depots, machine shops, necessary for the construction and operation of the railroad, becoming, by annexation, a part of the realty—it is inevitable that the aggregate land, roadbed, rails and ties, and said appurtenances, constitute the right of way contemplated by Congress. A less consideration could have been no inducement to the company to accept the franchise, and that it should now be deprived of this advantage, distinctly conferred by the supreme authority creating it, by a subordinate, dependent body, deriving its existence from the power that created both, would be unjust, if not iniquitous. The Atlantic & Pacific corporation, within the limits of the act creating it, is as complete and independent as the territory of New Mexico under its organic act. Both are creatures emanating from the same source, and it cannot be that the latter impair the rights of the former."

In the case at bar the rights of the agency to operate by government lease and the alleged and pretended right of the State to tax those rights of the agency, not only emanate from the same source but *are found in the same act.*

3. *The phrase "other rights," refers to property of an intangible or special nature subject to a property tax.*

It is fairly deducible from well known definitions that where the words *property, assets* and *rights* are all used and grouped together, as in the proviso clause of Sec. 32, *prop-*

erty denotes real estate and personal property of a tangible nature, *assets* refers primarily to money, credit or other liquid property, and *rights* to property of a particular nature such as rights of way for pipe lines, automobile roads, railroads and the like, or to franchises or contract rights, or to specially classified property such as water rights. The grouping of these terms in one clause is consistent with the overlapping nature of their definitions. As is the common habit of legislatures, a series of words or objects are grouped to cover all members of a class.

An example of a right of way taxed by the States as property is seen in *Choctaw, Okla. and Gulf R. R. Co. v. Mackey,* 256 U. S. 531; 65 L. Ed. 1076; 41 Sup. Ct. Rep. 582.

All doubt as to what could be meant by *other rights* in this connection disappears upon a consideration of *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185, 219; 41 L. Ed. 965, 977; 17 Sup. Ct. Rep. 604, 605. The express company here maintained that it was taxable only upon its tangible property contained in the respective States laying the tax. The Court held that the property of the corporation consisted in what the capital stock represented, saying:

> "It matters not in what this intangible property consists—whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. Now whenever separate articles of tangible property are joined together, not simply by a unity of ownership, but in a unity of use, there is not infrequently developed a property, intangible though it may be, which in value exceeds the aggregate of the value of the separate pieces of tangible property. * * *
>
> "A distinction must be noticed between the

> construction of a state law and the power of a state. If a statute, properly construed, contemplates only the taxation of horses and wagons, then those belonging to an express company can be taxed at no higher value than those belonging to a farmer. But if the state comprehends all property in its scheme of taxation, then the goodwill of an organized and established industry must be recognized as a thing of value. The capital stock of a corporation and the shares in a joint-stock company represent not only the tangible property, but also the intangible, including therein all corporate franchises and all contracts, privileges, and goodwill of the concern. * * *
>
> "But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000."

It was clear that the taxes were property taxes and the Court refused to construe them as anything else. On page 219 it said:

> "They purport to be upon the property of the companies. They are therefore not in form, at least, subject to any of the denunciations against privilege taxes which have so often come from this court. The statutes grant no privilege of doing an express business, charge nothing for doing such a business, and contemplate only the assessment and levy of taxes upon the property of the express companies situated within the respective states."

The right or franchise to be a corporation is taxable as a property right without interfering with any interstate commerce or governmental functions of the corporation. This right is clearly different from the powers the corporation may exercise pursuant to its possible nature as a governmental agency, means or instrumentality. This distinction is carefully set forth in the language of the Court in *Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. Law 529, 535, 25 L. R. A. 134, 137, as follows:

> "In the case of *Horn Silver Min. Co.* v. *New York* this language is used: 'The right and privilege, or the franchise, as it may be termed, of being a corporation, is of great value to its members, and is considered as property separate and distinct from the property which the corporation itself may acquire. According to the law of most states this franchise or privilege of being a corporation is deemed personal property and is subject to separate taxation. * * * The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation.' The franchise here referred to as property subject to the taxing power is likewise the subject of remark in the case of *Minot v. Philadelphia, W. & B. R. Co.*, 85 U. S. 18 Wall. 206, 21 L. Ed. 888 (the *Delaware Railroad Tax Case*): 'The exercise of the authority which every state possesses, to tax its corporations, and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business, or income, or by the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports, or tonnage, or trans-

portation to other states, cannot be regarded as conflicting with any constitutional power of congress.' The tax imposed by the act in question affects commerce among the states, and impedes the transit of persons and property from one state to another, just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result, of itself, constitutes no objection to its constitutionality. As was very justly observed in this court in a recent case *(State Tax on Railway Gross Receipts,* 82 U. S. 15 Wall. 284, 21 L. Ed. 164), 'every tax upon personal property, or upon occupations, business, or franchises, affects, more or less, the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution.' This language is quoted, not because the word 'franchise' is used in the precise sense to be presently ascribed to it, but for the purpose of showing that a payment for a state privilege may incidentally affect commerce without being, in a constitutional sense, a regulation of it.

"The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the powers that, under such form, the company may exercise. This distinction, although formulated by *Mr. Justice* Field in *Horn Silver Min. Co.* v. *New York,* 143 U. S. 305, 36 L. Ed. 164, 4 Inters. Com. Rep. 37, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this state we tax each of these so-called franchises. The former, as in the case of the right to own and

operate a railroad, is taxed as property having a true value, which it is the duty of the state board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed, as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion. It is, in short, a poll tax levied upon domestic corporations for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on. If the business chance to be one of commercial intercourse with other states, the burden incidental to corporate existence does not, under the federal decisions just cited, constitute a regulation of that commerce."

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, 155; 55 L. Ed. 389, 415; 31 Sup. Ct. Rep. 342, 351, this Court says:

"But it cannot be admitted that franchises granted by a state are necessarily exempt from taxation; for franchises are property, often very valuable and productive property."

To conclude this portion of the argument we confidently submit that the right of the States to levy a property tax upon franchises, privileges, contracts and good will already exists and is merely confirmed by the act. *Other rights* does not refer in said proviso to the business of producing oil but can and does refer to property rights which are already subject to a state property tax.

4. *The proviso clause in Section 32 is introduced out of abundant caution to remove all doubt of the intention of Congress.*

The proviso clause of Section 32 as is often the case with

proviso clauses, is introduced to exclude some possible misinterpretation of the act.

In *Minis v. United States,* 15 Pet. 423, 445; 10 L. Ed. 791, 799, we note the following language:

> "The office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or *to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview.*"

This language was referred to with approval in *White v. United States,* 191 U. S. 545, 551; 48 L. Ed. 295, 297; 24 Sup. Ct. Rep. 171, 172.

That there is a real danger of misinterpretation of this act appears when it is remembered that Congress is adopting a new policy in the disposal of certain of the public lands, and that in connection therewith it might either exempt from taxation the property of its lessees which would otherwise be taxable, or might render property or activities taxable which would otherwise be removed from the taxing power of the State. That Congress might follow either course is apparent from the following authorities.

Congress may exempt the property of an agency or instrumentality from state taxation, but in the absence of a declaration thereon, the taxing power directed against property as such, remains. This has been frequently ruled by this Court.

In *Thompson v. Union Pacific Railroad Co.,* 9 Wall. 579, 590; 19 L. Ed. 792, 798, the Court said:

> "But we are not aware of any case in which the real estate or other property of a corporation not organized under an Act of Congress, has been held to be exempt, *in the absence of express legislation to that effect,* to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government. * * *
>
> "It will be safe to conclude, in general, in

> reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection."

See also *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, 416; 38 L. Ed. 1028, 1030; 14 Sup. Ct. Rep. 1060, 1061, where the Court said:

> "Similarly we think it may be said that, *conceding to Congress the power to remove the corporation in all its operations from the control of the state*, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

An outstanding example of the prohibition of a tax upon property owned by a governmental agency is *United States Trust Co. v. Atlantic and Pacific Railroad Co.*, 8 N. M. 673; 47 Pac. 725.

Here Congress granted a right of way to the railroad and in the same act exempted it from taxation within the territories of the United States.

Another and a recent example arises from the Federal Farm Loan Act of July 17, 1916, 39 Stat. at L. 360, Ch. 245, as amended. The farm loan bonds were declared by the act to be instrumentalities of the government of the United States and as such, with the income derived therefrom, to be exempt from all taxation. Section 26 of the Act contained this significant proviso, leaving the power of the state to tax property of banks in full force:

> "Nothing herein shall be construed to exempt the real property of Federal and Joint stock land banks and national farm loan asso-

ciations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The provisions of this act and the power of Congress to pass such legislation is discussed in *Smith v. Kansas City Title and Trust Co.*, 255 U. S. 180; 65 L. Ed. 577; 41 Sup. Ct. Rep. 243.

On the other hand the United States can authorize the States to tax property otherwise untaxable, such as land belonging to the United States.

In *Cenral Pacific R. R. Co. v. Nevada*, 162 U. S. 512; 40 L. Ed. 1057; 16 Sup. Ct. Rep. 885, it appeared that *Union Pacific R. Co. v. McShane*, 22 Wall. 444; 22 L. Ed. 747, and *Northern Pacific R. Co. vs. Traill County*, 115 U. S. 600; 29 L. Ed. 477; 6 Sup. Ct. Rep. 201, had held that the States could not tax *surveyed* unpatented lands embraced in railroad grants. The act of July 10, 1886 (24 Stat. 143), authorized such taxation. Nevada had attempted to tax *surveyed* unpatented lands included in the Federal grant to the Central Pacific Railroad Company and was therein upheld by this Court.

A further example of federal authorization of a tax upon property, not otherwise taxable, is seen in the Minnesota Drainage Act of May 20, 1908 (35 Stat. 169).

The national banking laws afford a striking example of the length to which Congress may go to permit the taxation of its instrumentalities. *The states would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises were it not for the permissive legislation of Congress.*

Owensboro National Bank v. Owensboro, 173 U. S. 664, 667; 43 L. Ed. 850, 852; 19 Sup. Ct. Rep. 537, 538.

Bank tax cases—Van Allen v. The Assessors, 3 Wall. 573, 594; 18 L. Ed. 229, 239.

Bank of California v. Richardson, 248 U. S. 476; 63 L. Ed. 372; 39 Sup. Ct. Rep. 165.

In *Van Allen v. The Assessors, supra*, the Court said:

> "In enacting the national bank law, Congress must have had in view the great principles already established by the decisions of this court: (1) That the states cannot tax the agencies of the national government; (2) that states cannot tax the national securities in the hands of individual citizens; (3) that states cannot tax the national securities in which may be invested the whole or a part of the capital of any association or corporation.
>
> "They also had in view, doubtless, the exception to exemption suggested by Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat. 316, when he said, that the opinion of the Court did 'not extend to a tax paid by the real property of the bank in common with the real property within the state; nor to a tax imposed on the interest which the citizens of Maryland might hold in the institution in common with the property of the same description throughout the state.'
>
> "*With these principles and this exception in view, Congress, in order that nothing might be left to inference,* expressly authorized state taxation of the real estate held by the national banking associations, and of the interest of private citizens in them. This was done by three provisos to the 41st section, which prescribed the measure and rule of national taxation."

The right to tax the shares of a national bank standing in the name of the owner thereof or to tax the real property belonging to the bank is expressly covered by Congress in unambiguous language by Rev. Stat. Sec. 5219, Comp. Stat. 1916, Sec. 9784, as follows:

> "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the asso-

> ciation is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

A comparison of this language with that of the proviso of Sec. 32 of the Leasing Act is a sufficient answer to the contention that the latter confers a power upon the States not possessed by them. The foregoing language of Sec. 5219 makes no reference to powers which the States "may have." Its language is unambiguous and although in the form of a proviso clause, relates solely to the conferring of a power to tax shares and property which otherwise, as clearly held by this Court, would not be taxable. The language of Sec. 32 of the Leasing Act refers generally to *rights of the States* which the act shall not *affect* and the clause which contains the alleged grant of power is merely descriptive of certain rights which are not to be affected. As a grant of power, to say the least it must be held that the language is extremely ambiguous. It is as if Congress had said by Sec. 5219, at least as far as property of the bank is concerned, as follows: "We authorize that things previously not taxable may be taxed by the State in spite of the power of Congress to continue that already existing exemption. We grant power to tax what is now exempt and which exemption we could continue or which exemption we could at least establish." By Sec. 32 of the Leasing Act on the other hand Congress must be held to say: "We take nothing from the States which they now have.

They may continue to exercise their already existing rights including taxation of the property of the instrumentality we are setting up. We could take away the rights of the states in this connection but we make it clear that we are not doing so."

Although it is thus apparent that the United States might even permit the taxation of the operations of its agency, means or instrumentality, it seems to us highly improbable that Congress would do so, and as we shall point out, every ambiguity must be resolved against the surrender of such a valuable attribute of its paramount sovereignty. There being these possibilities we are not surprised to have a proviso clause such as that contained in Sec. 32 to clear up the uncertainty. The presence of such a clause follows logically from the very nature of such a statute, for as the Court said in *United States v. Midwest Oil Co.*, 236 U. S. 459, 474; 59 L. Ed. 673, 681; 35 Sup. Ct. Rep. 309, 313:

> "These rules or laws for the disposal of public lands are necessarily general in their nature."

We pass now to a frequent example of a proviso clause in taxation statutes which further illustrates the necessity for such a provision in the Leasing Act. In the compacts by which new states are admitted to the Union, the provision is usually inserted that the States shall make no claim against the property of the United States, which shall remain under the absolute jurisdiction and control of Congress. This provision in the Montana Enabling Act has been quoted supra. In *Van Brocklin v. Anderson*, 117 U. S. 151, 171; 29 L. Ed. 845, 852; 6 Sup. Ct. Rep. 670, 681, the Court explains the reason why this practice grew up, saying:

> "The Legislatures of most of the States have affirmed the same principle, by inserting in their general tax Acts an exemption of property belonging to the United States. Such a provision, as has been well observed by the Supreme Court of Connecticut in *West Hartford v. Water Comrs.* above cited, is not the foundation of the exemption, but is inserted only from abundant

> caution, and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but presumably unlearned in legal distinctions. 44 Conn. 368."

We submit that the same reasoning applied to Sec. 32 of the Leasing Act. Congress is advising the taxing officials of the States to proceed as they always have done and in the absence of a statement by Congress to the contrary, as they always could do, to tax the property of all persons and corporations, including the property of instrumentalities and agencies provided for in the Act. Again the Leasing Act itself is bound to be of a general nature and the administration thereof depends upon and in fact could not take place without rules and regulations made and amended from time to time by the administrative officer in charge. Congress recognized this necessity in the act itself, for Sec. 32 provides that the Secretary of the Interior shall make such rules and regulations, as follows:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act: *Provided,* That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States."

The regulations that have been issued pursuant to Section 32 and those that may hereafter be issued, are bound to be of an important and sweeping nature. They conceivably could run counter to various rights of the States, not only the right of taxation which is merely one right introduced by the word *including*. We believe that it is not inconsistent with the great

respect due a high administrative officer of the Government such as the Secretary of the Interior, for us to say that Congress was here cautioning the Secretary of the Interior in the exercise of his duties, so that existing rights of the States might not be interfered with.

5. *Assuming the language of Section 32 to be uncertain and doubtful, it cannot confer the right to tax operations of plaintiff in error.*

Taking Sec. 32 of the Leasing Act as favoring the defendant in error, it must be assumed that the language is ambiguous. But even so, statutes in derogation of sovereignty are always strictly construed in favor of the government so that its sovereignty will be broadened and upheld rather than narrowed and destroyed. The surrender or divesting of such rights cannot be founded upon doubtful or uncertain phraseology.

United States v. Utah Power and Light Co., (CCA 8th Circuit), 209 Fed. 55.

Austin v. Aldermen of Boston, 7 Wall. 694, 699; 19 L. Ed. 224, 226.

Sturges v. Crowninshield, 4 Wheat. 122; 4 L. Ed. 529.

Louisville & N. R. Co. v. Commonwealth of Kentucky, 161 U. S. 677, 685; 40 L. Ed. 849, 854; 16 Sup. Ct. Rep. 714, 717.

United States v. Herron, 20 Wall. 251, 263; 22 L. Ed. 275, 279.

Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., 138 U. S. 287, 293; 34 L. Ed. 967, 969; 11 Sup. Ct. Rep. 301, 303.

United States v. Shaw (Cir. Ct. S. D. Ga. E. D.), 39 Fed. 433.

Potter v. Fidelity & Deposit Co., 101 Miss. 823, 826; 58 So. 713, 714.

In *Austin v. Aldermen of Boston, supra,* the Court says:

> "The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

> "It is well settled that the States cannot exercise this authority in respect to any of the instrumentalities which the General Government may create for the performance of its constitutional functions. It is equally well settled that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper, by the law-making power of the nation; *but the waiver must be clear, and every well grounded doubt upon the subject should be resolved in favor of the exemption.*"

In *United States v. Herron, supra,* the Court said:

> "The Legislature, if they intended to divest the sovereign power of any right, privilege, title or interest, would say so in express words; and where the Act contains no words to express such an intent, that it will be presumed that the intent does not exist."

In the *Wheeling & Belmont Bridge Co. v. Wheeling Bridge Co., supra,* the Court said:

> "An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

6. *The history of the legislation shows that Congress intended the distribution of royalties to be in lieu of the extensive right of taxation belonging to the states under the public mining laws.*

The distribution of the royalty to the general fund, the reclamation fund and the States was intended by Congress to be in lieu of the rights of taxation the States would have exercised had the lands gone to patent under the former system of disposal of public lands. Under the old system, the state

could tax the patented land and could, of course, also tax the producer of oil from those lands, as no governmental instrumentality would be involved.

We recognize that it is true that the debates in Congress cannot be used to determine the meaning of the Act. However, it is clear that such resort can be had to examine the history of the Act and the evil which the legislation was intended to remedy.

United States v. Union Pacific R. R. Co., 91 U. S. 72, 79; 23 L. Ed. 224, 228.

Jennison, Exr. v. Kirk, 98 U. S. 453, 459; 25 L. Ed. 240, 243.

In the *U. S. v. U. P. R. Co., supra,* the Court says:

> "In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts may, with propriety, in construing a statute, recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. Aldridge v. Williams, 3 How. P. 24; Preston v. Browder, 1 Wheat. 120.
>
> "Many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which surrounded Congress when the Act was passed. The war of the rebellion was in progress; and the country had become alarmed for the safety of the Pacific States; owing to complications with England."

In *Jennison, Exr. v. Kirk, supra,* the Act of Congress of July 26, 1866, was before the Court for construction. The

Court refers extensively (p. 243) to the remarks of Sen. William M. Stewart, the author of the act, in part as follows:

> "The Legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining claims, and, when not in conflict with the Constitution or laws of the State or of the United States, should govern their determination; and a series of wise judicial decisions had molded these regulations and customs into 'A comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes.' The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself, under the implied sanction of a just and generous government. And the Act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess., 39th Cong., part iv., pp. 3225-3228.
>
> "These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the Act."

We, therefore, deem the authority sufficient for us to quote from the Congressional Record in support of our present contention. We refer to Vol. 57, part 4, p. 3703, setting forth the remarks of Frank W. Mondell in the House of Representatives when the Conference Report on the Leasing Act was presented:

> "There is one feature of this bill I find it difficult to discuss in parliamentary language. Imagine, if you please, that 100 years ago the Federal Government had reserved from sale and taxation title to all the coal and oil lands in the Commonwealth of Pennsylvania, and provided that for the future no taxes would be levied or collected on any of the limitless values of those lands, that the State must seek elsewhere for the funds with which to provide schools and roads and maintain government in the industrial region built around these valuable mineral deposits. What would have been the condition of Pennsylvania today? What would have been the condition of Illinois today if she did not have the right to tax the coal values of her land? People of that western country, accepting the principle of perpetual Federal ownership and lease, did at least expect that they should be compensated out of the sums taken in the form of royalty for the millions that will be kept from treasuries in the running of time, because they will not be allowed to levy taxes on the values of their mineral lands. * * *
>
> "* * * *If developed under fee title the lands would be taxable, but if leased they are not taxable,* and my contention is that the people of these States are entitled to at least half the royalties *in lieu of the taxes they lose by reason of the lands being developed under a Federal lease.* It has been said that nothing is settled until it is settled right. In the truth of the maxim I still have faith that if this bill pass in its present form *justice will eventually be done in this regard by a change of the law.*"

As a result of Mr. Mondell's efforts and that of other Western representatives and senators, the leasing bill finally enacted contains Sec. 35 quoted supra, in lieu of Sec. 34 of the original Conference Report bill. We believe Sec. 35 read with Sec. 32 indicates that the States are limited to the right to tax the improvements, etc., of the lessee, and that the return of royalty was intended to compensate the States for the loss both of taxes upon lands no longer subject to patent and upon the operations of governmental instrumentalities producing oil therefrom.

CONCLUSION

We have endeavored to set forth as briefly as possible the reasons for our contention that the provisions of the Oil Producers' License Tax Law of Montana, as applied to the plaintiff in error, is unconstitutional. It has been our effort to select and cite to the Court only those decisions which are most directly in point and most clearly point out and illustrate the various legal propositions for which we are contending.

We cannot but feel that the Oklahoma decisions have foreclosed the contention of the defendants in error, but apparently the rules therein announced have not yet been applied to operations on Government lands under the leasing law. We have been able to discover no difference in the situation presented by operations under leases of Indian lands and the facts here.

We believe that this Court has heretofore upon all occasions shown great reluctance to permit any encroachment upon or interference with the sovereign rights of the Federal government by the States. We submit that this course is enjoined by the Constitution and should be applied even where avenues of taxation are thereby closed to the States. Having adopted a new policy of disposing of certain of the public lands, Congress could not be held, except under the most explicit language, to have granted to the States the power to hinder or defeat by taxation the operations of the instrumentality employed to effect such disposal.

For the foregoing reasons and under the foregoing au-

thorities, we respectfully submit that the decision and judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 256

MID-NORTHERN OIL COMPANY,
PLAINTIFF IN ERROR.

vs.

J. W. WALKER AS TREASURER OF THE STATE OF MONTANA; JOSEPH M. DIXON, GOVERNOR OF THE STATE OF MONTANA; C. T. STEWART, SECRETARY OF STATE OF THE STATE OF MONTANA, ET AL., ETC.
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

The statement of the case as made by plaintiff in Error is correct with the exception of the statement on page 1 to the effect that the taxation of mines and their output in Montana is limited by the Constitution to their net proceeds. The same section of the Constitution relating to the assessment of net proceeds (Sec. 3, Art. XII) also provides for the assessment of machinery and improvements, and Section 1, Article XII of the Constitution, after providing for the assessment of all property, provides:

> "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state."

This provision has application to all persons and corporations and applies to the mining industry as well as to other industries of the state.

It was by virtue of the authority conferred by this section of the constitution that the legislation in question was enacted.

ARGUMENT.

I.

PLAINTIFF IN ERROR IS NOT AN AGENT OR INSTRUMENTALITY OF THE FEDERAL GOVERNMENT.

We concede that the tax in question is a license tax and also that a license cannot be imposed by a state upon a governmental agency, means or instrumentality without permission from Congress. However, this is true only where the tax impairs the efficiency of the agency in performing the governmental function.

> *Western Union Telegraph Co. v. Atty. Gen'l,* 125 U. S. 530; 31 Law Ed. 790.
> *Union Pac. Ry. Co. v. Peniston,* 18 Wall. 5; 21 Law Ed. 787.

We respectfully contend, however, first: that the plaintiff in error is not a governmental agency or instrumentality, and second: that Congress has consented that a tax such as the one here involved may be imposed.

(a) OKLAHOMA CASES CONSIDERED.

The plaintiff in error contends that it is a governmental agency or instrumentality, and relies upon the cases of *Choctaw, etc., v Harrison,* 59 Law Ed. 234, 235 U. S. 292; 35 Sup. Ct. Rep. 27; *Indian Territory Illuminating Oil Co.*

v. Oklahoma, 60 Law Ed. 799; 240 U. S. 522; 36 Sup. Ct. Rep. 453; and *Gillespie v. Oklahoma,* 66 Law Ed. 338; 257 U. S. 501; 42 Sup. Ct. Rep. 171.

An examination of those cases, however, will show that they are based upon facts different than those in this case. In those cases the lands in question belonged to Indian tribes and, by reason of an Act of Congress, the United States government had agreed that the mines should be operated under the supervision and control of two trustees appointed by the president and subject to rules prescribed by the Secretary of the Interior; the government was obligated to operate and was operating the mines; in the performance of this obligation the agency chosen for that purpose was performing functions or duties devolving upon the government and, of course, as such was exempt from the imposition of state taxes.

In the instant case there is no duty or obligation on the part of the government to operate oil leases, and the government is not operating them. Those operating leases are not discharging any function of the federal government. They are operating solely for their own profit and gain. In the case of *Choctaw, etc., v. John A. Harrison,* 59 L. Ed. 234, 237, above referred to the Court said:

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the United States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect. Such an agency cannot be subjected to an occupation or privilege tax by a state." (Citing cases).

In the case of *Indian Territory Illuminating Oil Company v. State of Oklahoma,* 60 L. Ed. 779, above referred to, the facts were the same as in the Harrison case except that it pertained to oil and gas rather than coal.

In the case of *Gillespie v. Oklahoma*, 66 Law Ed. 338, which arose out of the same facts as the Harrison case, the Court, in characterizing the lessees as agents carrying out a duty owing by the government to the Indians, said:

> "It is agreed that the lessee was an instrumentality used by the United States in carrying out duties to the Indians that it had assumed, and that the only question in the case is whether he is liable to this kind of tax."

And commenting upon the decisions in the Harrison case and the Indian Territory Illuminating Oil Company case, the Court said:

> "In *Choctaw, O. & G. R. Co. v. Harrison, supra,* it was held that such a lessee could not be taxed on the gross sales of coals from Choctaw and Chickasaw mines, when the tax was in addition to the taxes collected upon an ad valorem basis. In *Indian Territory Illuminating Oil Co. v. Oklahoma, supra,* it was held that a similar lessee could not be taxed upon the value of an Osage oil lease. Subsequently the principle was applied per curiam to gross production taxes under a later statute of 1916, without reference to the fact that the taxes, instead of being in addition to, were in lieu of, all taxes upon property rights. *Howard vs. Gipsy Oil Co.*, 247 U. S. 503, 62 L. Ed. 1239, 38 Sup. Ct. Rep. 426; *Large Oil Co., vs. Howard,* 248 U. S. 549, 63 L. Ed. 416, 39 Sup. Ct. Rep. 183."

The two cases cited by the court are cases involving oil and gas leases on Indian lands.

And again the Court said:

> "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profits of the leases; and stopping short of theoretical possibilities, *a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards.*" (Italics ours).

Of course, there is a clear distinction between a lessee of Indian lands and a lessee of government lands. In the one case the government is performing a duty which it has assumed toward the Indians, and in the other there is no such duty or obligation.

In the case of *Choctaw, Oklahoma & Gulf R. R. Co. et al. vs. Mackey,* 65 L. Ed. 1076; 256 U. S. 531, the Court in effect modified its opinion in the above cases even as to property belonging to the Indians. The Rock Island, Etc., R. R. Co., one of the plaintiffs leased its property from the plaintiff, Choctaw, etc., R. R. Co. The latter company had obtained from Congress the right to build a railroad in Indian Territory, with a branch line to coal mines leased from the Choctaw nation.

It was contended that the railroad was an instrumentality through which the government undertook to perform its obligation to develop coal lands belonging to the Indians, and thus exempt from taxation. Of this the Court said:

> "The mere fact that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation. The most that can be said here is that, among the public served by this railroad, are some mines on land leased from the Choctaw nation. The right of way and station grounds in question, instead of being, as was perhaps originally contemplated by the Act of February 8, 1888, part of a branch to leased 'coal veins,' have become

> an integral part of through lines of a great railroad system. Holdenville is on the main line of the Choctaw, Oklahoma & Gulf, which extends from the west bank of the Mississippi river through Arkansas and Oklahoma to the Texas state line,—a distance of nearly 650 miles. By the lease to the Rock Island, this railroad has become a part of the through lines of a much larger system. And even though it be granted that the federal government utilized the railroad as an instrument in working out its policy toward the Indians, the tax upon the railroad property would be none the less valid." (Citing cases).

The Supreme Court of the State of Montana, after reviewing the above decisions of this Court, concluded as follows:

> "As we understand these decisions, the exemption in each instance was based solely upon the peculiar character of the lease involved and not upon the fact that the individual or corporation benefited was a lessee of the government. In other words, the court did not hold that every individual or corporation having a lease upon public land is ipso facto an agent or instrumentality through which the government executes its power to dispose of the public lands, but it did hold that the fiduciary relationship existing between the United States and the particular Indian wards imposed upon the government a positive duty to lease the Indian lands and to secure for the Indians the most advantageous terms available; that in the discharge of its duty the government approved the leases in question and chose the lessee in each instance as its agent or

> instrumentality through which it carried its leases into execution, and thereby discharged its public duty." (Tr. p. 28).

Mineral deposits situated upon Indian lands are not subject to location and acquisition under the mining laws of the United States.

> *Oklahoma v. Texas,* 66 Law Ed. 771; 258 U. S. 574.

In the cases above cited from Oklahoma, the government was not making and had not made a disposition of the mineral lands or the mineral deposits in question. The government itself was operating the property through an agent or lessee chosen for that purpose.

In this case, under the Federal Oil and Gas Leasing Act of February 25, 1920, being the Act under which the leases in question were given, the government is making a disposition of its interest in the mineral deposit. It is not engaged in operating the property through an agent or lessee, but has made a disposition of its interest in the land for oil and gas purposes. This is apparent from the first section of the Act, which provides:

> "That deposits of * * * oil * * * or gas, and lands containing such deposits owned by the United States, * * * shall be subject to disposition in the form and manner provided by this act to citizens of the United States, * * * or to any corporation organized under the laws of the United States, or of any state. * * *." (1920 Sup. Fed. St. Ann. 187).

To the extent of the interests conveyed or granted to the lessees, under this act, the United States has relinquished and disposed of its interest, and this interest, in the hands of the lessee, is subject to taxation by the State.

(b) THE STATUS OF PLAINTIFF IN ERROR IS THE SAME AS ANY OTHER CORPORATION IN BUSINESS FOR PROFIT.

The plaintiff in error does not occupy any different status before the law than any other person or corporation engaged in business for profit, and obviously a corporation, having no purpose other than its own profit and gain, cannot be termed a Federal agency.

This Court, in the recent case of *Clallam County v. United States* reported in the Advance Opinions of the United States Supreme Court of December 15, 1923, 68 Law Ed. —, had before it the question as to whether the United States Spruce Production Corporation was a Federal agency. It was organized by the United States as an instrumentality for carrying on the war. It was clearly an agency of the Federal government. After holding that it was a Federal agency, the Court used the following language:

> "This is not like the case of a corporation having its own purposes as well as those of the United States, and interested in profit on its own account."

It was held in the case of *St. Louis-San Francisco Railway Company vs. George H. Middlekamp et al.*, 65 L. Ed. 905; 256 U. S. 226, that a railroad company, while under Federal control, was not exonerated from a state franchise tax, the Court holding that such a railroad company, while under Federal control, was not an agent of the Federal government. The Court said:

> "Of course, the fact that the plaintiff's road was under Federal control during the year in question does not exonerate it. It was profiting by its franchises, although in a different way."

A corporation not performing any of the constitutional functions or powers of the Federal government, but en-

gaged solely in business for its own private gain and advantage, such as the plaintiff in error in this action, cannot be considered as an agent or instrumentality of the Federal government so as to be exempt from taxation by the state.

In the case of *Baltimore Shipbuilding, etc. Co. v. Mayor and City Council of Baltimore*, 49 L. Ed. 242, 195 U. S. 375, the plaintiff contended that its land, purchased from the United States on condition that it be used for a drydock and in which the United States reserved the right to use the same whenever desired for the examination and repair of vessels and, if the plaintiff should divert the use of the land to any other purpose, it would revert back to the United States, was exempt from taxation by the state. The Court in summing up the contention of plaintiff said:

> "It is argued that the United States has such an interest in the land as to prevent the tax, and also that the land is an agency of the government by the terms of the grant."

In disposing of this contention the Court said:

> "Finally, we are of the opinion that the land is not exempt as an agency of the United States. The dock company disclaimed that position for itself as a corporation, but asserts it for the land. The position is answered technically, perhaps, by what we have said already. The United States has no present claim against the corporation, reinforced by a condition. *But, furthermore, it seems to us extravagant to say that an independent private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time.*" (Italics ours).

In *Thomson v. U. P. R. R. Co.*, 19 L. Ed. 792, 9 Wall. 579, there is an exhaustive discussion of this question and the Court after reviewing many of the authorities, said:

> *"But we are not aware of any case in which the real estate, or other property of a corporation not organized under an Act of Congress, has been held to be exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government.* * * * We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding its property within state jurisdiction and under state protection. * * * We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government, every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. The amount of property now held by such corporation, and having relations more or less direct to the National Government and its service, is very great. And this amount is continually increasing; so that it may admit of question whether the whole income of the property which will remain liable to state taxation if the principle contended for is admitted and applied in its fullest extent,

> may not ultimately be found inadequate to the support of the state governments." (Italics ours).

In the case of *Fidelity & Deposit Co. of Maryland v. Commonwealth of Pennsylvania,* 60 L. Ed. 664, 240 U. S. 319, the plaintiff corporation had become surety upon bonds required by the United States in the following matters: "Internal Revenue, Customs, United States Government Officials, United States Government contracts and Banks for U. S. Deposits, Bonds given in Courts of the United States in litigation there pending."

An Act of Congress relating to what corporations would be accepted as sureties on a bond was also relied upon to constitute the Surety Company a Federal Agent. In speaking of this the Court said:

> "In behalf of plaintiff in error, counsel maintained that the taxing power of the state has been so exercised as to collide with operations of the Federal government; that under the act of Congress the surety company became a Federal instrumentality with power to execute bonds within the state, and consequently could not be subjected to a privilege tax therefor.
>
> "That the challenged tax 'is an exaction for the privilege of doing business' seems plain (*Equitable Life Assur. Soc. vs. Pennsylvania,* 238 U. S. 143, 59 L. Ed. 1239, 35 Sup. Ct. Rep. 829); and undoubtedly a state may not directly and materially hinder exercise of constitutional powers of the United States by demanding in opposition to the will of Congress that a Federal instrumentality pay a tax for the privilege of performing its functions. *Farmers' M. Sav. Bank vs. Minnesota,* 232 U. S. 516, 58 L. Ed. 706, 31 Sup. Ct. Rep. 354; *Choctaw, O. N*

> *G. R. Co. vs. Harrison,* 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27. *But mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies, and confer freedom from state control. Baltimore Shipbuilding* N *Dry Dock Co. vs. Baltimore,* 195 U. S. 375, 49 L. Ed. 242, 25 Sup. Ct. Rep. 50. (Italics ours).

A person or corporation, having the use of property, will not be permitted to take advantage of the fact that the legal title is in the government to avoid the payment of his or its proportion of taxes.

In *N. P. Ry. Co. v. Patterson,* 38 Law Ed. 934, 154 U. S. 130, this Court said:

> "It was said in *Wisconsin Cent. R. Co. vs. Price County,* 133 U. S. 496, 505 (33: 687, 692), that he who has the right to property, and is not excluded from its enjoyment, *shall not be permitted to use the legal title of the government to avoid his just share of state taxation."* (Italics ours).

II.

THE DISPOSAL OF PUBLIC LANDS BY THE UNITED STATES IS NOT THE PERFORMANCE OF A TRUST PREVENTING STATE TAXATION.

From page 20 to page 39, under subdivisions 3 and 4 of its brief, plaintiff in error makes the contention that the government of the United States is performing a trust obligation in the disposition of oil and gas leases, and that its lessee is, therefore, within the rule announced by this court in the Oklahoma cases.

The cases cited by counsel hold that the government is, with respect to its land, in the same situation as an ordinary

proprietor and may deal with it the same as an individual owner.

Camfield v. U. S., 167 U. S. 524, 42 Law Ed. 260, 17 Sup. Ct. Rep. 864.

Light v. U. S., 55 Law Ed. 570; 220 U. S. 523; 31 Sup. Ct. Rep. 485.

Butte City Water Co. v. Baker, 196 U. S. 126, 49 Law Ed. 412, 25 Sup. Ct. Rep. 211.

United States v. Midwest Oil Co., 236 U. S. 459, 474; 59 Law Ed. 673, 681; 35 Sup. Ct. Rep. 309, 313.

Whether the United States, in the holding and disposition of the public lands, acts in a proprietary capacity, or by virtue of its sovereignty, is obviously of no importance insofar as a proper solution of the question involved is concerned. For the question is not in what capacity is the government acting in leasing its lands, but rather what governmental duty, if any, is the lessee performing in carrying out the terms of the lease. The government owes no legal duty to anyone to have the lands developed for oil and gas. Under the above cited cases, the government would be justified in withholding the lands entirely from lease. The lessee is not acting as the agent of the government in the performance or the discharge of any legal duty owing to anyone. The government is not operating the lands through its lessee, but, as above pointed out, under the act in question, as indicated in Section 1, the government has effectually disposed of its interest in the land to the extent of the interest covered by the lease.

If it be true, as contended by counsel for plaintiff in error, that the disposal of public mineral lands is the execution of a governmental function, that fact does not show that the plaintiff in error is performing a governmental function, because the plaintiff in error is not engaged in the disposal of such lands. It simply occupies the position of one to whom the government has disposed of its land.

There is no more reason for exempting the plaintiff in error in this case from the tax in question than there is to exempt one, to whom the government has disposed of its agricultural lands, from the payment of a tax on his improvements before patent issues, or on the land after obtaining patent.

If a State tax on improvements on agricultural land disposed of by the government, and a tax on the land after patent, does not impede or interfere with the government in the disposition of its agricultural lands (and that such a tax is proper there can no longer be any doubt), then the tax in question cannot be held to impede or interfere with the government in the disposition of its oil and gas-bearing lands. The same principle applies in each case.

III.

CONGRESS HAS CONFERRED POWER UPON THE STATES TO IMPOSE LICENSE TAXES UPON A LESSEE OF GOVERNMENT LANDS.

Section 32 of the Act, under which the leases in question were executed, provides:

> "That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this Act; Provided, *That nothing in this Act shall be construed or held to affect the rights of the states or other local authority to exercise any rights which they may have, including the right to levy and collect taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States.*" Italics ours).

This section of the statute was evidently intended to confer upon the several states the right to impose a tax such as that provided for by the law in question.

By the very terms of the lease itself, the government conceded the right of the state to impose the tax in question. Subdivision 1 of the lease (which is made a part of the complaint), in enumerating the conditions agreed to by the lessee, in part, provides:

> "To pay when due, all taxes lawfully assessed under the laws of the state upon improvements, oil, and gas produced from the lands hereunder, or other rights, property, or assets of the lessee." (Tr. p. 14).

The statutory provision above quoted constitutes a positive declaration on the part of the government that a lessee is not a governmental agency, so as to be exempt from the payment of a tax such as the one in question.

The case of *Choctaw O. & G. R. Co. vs. Harrison,* 59 Law Ed. 234, 235 U. S. 292, and *Indian Terr. Ill. Oil Co. vs. Oklahoma,* 60 Law Ed. 779, 240 U. S. 522, were decided prior to the passage of the Oil and Gas Leasing Act of 1920.

Section 32 above indicates a clear legislative intent that such lessees should not be considered Federal agencies such as the law exempts from the payment of taxes imposed by a state. The evident purpose of Section 32 was to change the rule announced by the Supreme Court of the United States in the cases above cited, as to all lessees of oil and gas rights under said Act.

The case is controlled by the language of this Court in the case of *Fidelity & Deposit Co. of Maryland vs. Commonwealth of Pennsylvania,* 60 Law Ed. 664, 240 U. S. 319, where this Court, in speaking of this question, said:

> "Moreover, whatever may be their status, if the pertinent statute discloses the intention of Congress that such corporations, contract-

> ing under it with the Federal government, shall not be exempt from state regulation and taxation, they must submit thereto."

The Supreme Court of Montana, in holding that Section 32 of the Oil and Gas Leasing Act showed a legislative intent to subject the lessees to a license tax, said:

> "In the absence of any congressional declaration upon the subject, all of the privately owned property of this plaintiff within the jurisdiction of the state, including the improvements upon the claims, the net proceeds of the mines, and other property or assets whether used in connection with the mining operations or not, is subject to taxation by this state, and excluding the terms just enumerated, we undertake to say that there is not anything else which is or could be subject of taxation except the privilege of producing oil, and if that privilege is held to be exempt, then the phrase 'or other rights' employed in the statute is meaningless. But we are not at liberty to assume that the Congress employed the expression merely for good measure or to conceal an idea; on the contrary, it is our judgment that the phrase was used advisedly with the other terms employed to indicate that a lease authorized by the statute shall not confer upon the lessee of the government the right to claim any special exemption from taxation which is not accorded to a lessee of a private owner." (Tr. p. 30).

Counsel for plaintiff in error contend that by the words, *"which they may have,"* used in Section 32 above quoted, Congress simply intended to confirm the rights that the states already had, and not to confer additional rights.

But why should Congress do a useless thing? It should rather be persumed that Congress intended to confer rights upon the states or it would have remained silent on the subject. The intent is made manifest by the use of the word "including" in conjunction with "other rights."

Counsel contend that "other rights" refer to property of an intangible or special nature. On pages 51 and 52 of their brief, they make the deduction "that where the words "property, assets and rights" are all used and grouped together, "property" denotes real estate and personal property of a tangible nature; "assets" refer primarily to money, credit or other liquid property, and "rights" to property of a particular nature such as rights of way for pipe lines, automobile roads, railroads and the like, or to franchises or contract rights, or to specially classified property such as water rights.

This deduction, however, is not borne out by the authorities cited. In fact, the authorities cited negative any such a conclusion.

Great stress is laid upon the case of *Adams Express Co. vs. Ohio State Auditor,* 166 U. S. 185, 219; 41 Law Ed. 965, 977; 17 Sup. Ct. Rep. 604. That case simply held that a tax on "property" included a tax on a franchise or intangible property. It is authority for the proposition that the word "property" includes franchises, privileges and other intangible property. To the same effect is *Del. Bldg. Co. v. State Board,* 55 N. J. L. 529, cited and relied upon by counsel in support of their deduction.

Therefore, under Section 32 of the Leasing Act, all of these matters were included in the word "property," and, by the use of the words "other rights," Congress manifestly had reference to a license tax for the privilege of doing business, which had theretofore been held invalid in the Oklahoma cases.

The quotation from the remarks of Frank W. Mondell, appearing on page 68 of the brief of counsel, does not militate against this contention. What he had reference to was

the loss to the states by reason of not being able to tax the land itself.

It is interesting to note in this connection, and as a means of arriving at the intention of Congress, that when the bill was originally introduced it did not contain the words "including the rights," but these words were inserted by way of amendment in the Senate. (Congressional Record, Vol. 57, part 4, page 3644-5).

This is conclusive of the intention of Congress to confer upon the states rights in addition to those that they already had.

It is proper to resort to the records showing the mode in which amendments were made to a bill to arrive at the legislative intent.

> *Blake v. The National City Bank of New York*, 23 L. Ed. 119; 23 Wall, 307, 319.

Counsel have also contended, under subdivision 4, page 56, of their brief that the proviso clause in Section 32 was inserted out of an abundance of caution to exclude some possible ground of misinterpretation.

This is not always the function of a proviso in a statute.

In the case of *The Georgia Railroad and Banking Company v. Smith*, 32 L. Ed. 377, 380, 128 U. S. 174, this court declared that a proviso may be used in a different sense, saying:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provision of it, or to qualify the operation of the statute in some particular. *But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'pro-*

vided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences." (Italics ours).

IV.

THE STATE OF MONTANA HAS POWER TO DESTROY THE CORPORATE CAPACITY OF PLAINTIFF IN ERROR, AND THEREFORE, MAY IMPOSE CONDITIONS UPON ITS RIGHT TO CONTINUE IN BUSINESS.

The Supreme Court of the State of Montana, in speaking of this power, said:

> "Plaintiff is a domestic corporation owing its very existence and right to transact business to the grace of this State expressed through our general incorporation laws and though its charter is a contract, it was sought and accepted upon the express condition declared by our state Constitution that the laws authorizing it 'shall be subject to future repeal or alteration by the legislative assembly.' (Sec. 2, Art. XV.) If, instead of enacting the occupation tax statute, our legislature had repealed the statute under which plaintiff exists, its powers to explore for or produce petroleum in this state would have been destroyed absolutely and plaintiff could not have been heard to complain. Section 6013, Revised Codes of 1921, in force in this state since July 1, 1895, provides: 'The legislative assembly may, at any time, amend or repeal this part or any chapter or section there-

> of and dissolve all corporations created thereunder.' That the power to destroy plaintiff as a corporate entity was reserved and may be exercised by this state is beyond controversy. (*Allen v. Ajax Mining Co.*, 30 Mont. 490, 77 Pac. 47; *Somerville v. St. Ouis M. & M. C.*, 46 Mont. 268, 127 Pac. 464). It would seem to be but a mere truism to say that the major power to destroy plaintiff's capacity to conduct business must, of necessity, include the minor power to exact an excise as a condition to its right to continue business." (Tr. p. 31).

It is contended however, that the contracts of the corporation may not be extinguished, by extinguishing the life of the corporation.

This in a sense may be true. It would be in the same situation as a deceased person. Its property would be liable for its debts the same as a deceased person.

The cases of:

> *Mumma v. The Potomac Company*, 8 Pet. 281, 8 L. Ed. 935; *Shields v. Ohio*, 95 U. S. 319, 324; 24 L. Ed. 357, 359;*Greenwood v. Union Freight Ry. Co.*, 105 U. S. 13, 19; 26 L. Ed. 961, 964.
>
> *Lake Shore and M. S. R. Co. v. Smith*, 173 U. S. 684, 690; 43 L. Ed. 858, 861; 19 Sup. Ct. Rep. 565, 567.
>
> *Cummington Realty Associates v. Whitten*, 239 Mass. 313; 132 N. E. 53; 16 A. L. R. 527,

cited and relied upon by counsel do not hold that the destruction of the corporate life of a corporation by the state does not destroy its right to operate a lease and to continue doing an active business in the state.

On the other hand, if the power to tax is "power to destroy," the State of Montana has the power, under Section

32 of the Leasing Act, to destroy the plaintiff by the taxation of its improvements, output, property, and assets.

As the Supreme Court of Montana observed, the State, having the major power to destroy plaintiff's capacity to transact business, has also the minor power to impose conditions upon its right to continue in business in the state.

For the reasons herein set forth, we respectfully contend the judgment of the Supreme Court of the State of Montana should be affirmed.

Respectfully submitted,

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